

*Tryals per Pais : 60*

OR THE  
LAW of ENGLAND  
CONCERNING  
**JURIES**

BY

*NISI PRIUS, &c.*

Newly revised, and much Inlarged,  
With an Addition of Precedents, and Forms of  
Challenges, Demurrers upon Evidence, Bills of  
Exception, Pleas *Puis le Darrein Continuance*, &c.

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**The Third Edition corrected and amended.**

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To which is now added,

**A farther Treatise of EVIDENCE.**

Together with a New and Exact TABLE to the  
Whole Matter.

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*Very Useful and Necessary for all Lawyers, Attorneys, and other Practisers, especially at the ASSISES.*

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By G.D. of the *Inner-Temple*, Esq;

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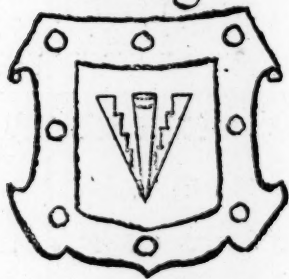
*Per testes solum, lex ipsa nunquam litem dirimit, quæ per Juratam  
xij. hominum decidi poterit. Cum sit modus ille ad veritatem  
eliciendam multo potior, & efficacior, quam est forma aliquarum  
aliarum legum orbis. Fortescue. Cap. 31.*

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## To the Practicers of the Law.

Gentlemen,

**I**N the Dedication of Books , such persons should be chosen whose Studies and Profession agree with the nature of the Subject. To prove Conclusions in one Science, by the Heterogene Principles of another: To make a Grammarian Patron to a piece of the Mathematicks: To Dedicate a Treatise of Logick to a Master of Musick; or a Matter of Practice, to a Man of Speculation; would not only be improper, but absurd. You know that in the whole Practice of the Law, there is nothing of greater Excellency, nor of more frequent Use, than Tryals by Juries. In this, our Common-Law (and not without just cause) values it self beyond the Imperial Law , before the Canon Law, or any other Laws in the World. And seeing the hopes and life of all

## To the Practicers

*the Process, the force of the Judgment and the Truth, nay the Right of the Parties lie in the Tryal; for as one Elegantly says, Qui non probat, at the Tryal, dicitur veritate & jure carere, and indeed the knowledge of all the Law tends to this: for without Victory at the Tryal, to what purpose is the Science of the Law? The Judge can give no Sentence, no Decision without it, and must give Judgment for that side the Tryal goes; therefore I may well say, 'tis the chief part of the Practice of the Law: And if so, to whom should I offer this Treatise, but to you the Practisers?*

*I need say nothing for small Tracts and Treatises; the infinite number of them in the Civil Law (there being for every Title a distinct Tract) nay the number of them in our Law, sufficiently shew their Use.*

*Joachimus Forbus Ringelbergius in his Book De Ratione Studij, giving directions what Books Students ought*

## of the Law.

*ought to carry with them, when they change places, and travel from one to another, tells us, That out of the Volumes (by reason of their bigness not portable) he used to tear out several leafs and take them with him in his Journeys, and so he said he had served the Works of Pliny, Tully, Plato, Demosthenes, &c. although he had given great prices for them; which justifies the writing of this Treatise, the subject matter thereof being of such general use in all Circuits.*

*When I read the elaborate Books of Farinacius de Testibus, and the three Exquisite and incomparable Volumes of Mascardus de Probationibus, in the Cæsarian and Pontifical Laws, (which Works were so valued and esteemed, that they were looked upon as new lights sent from Heaven, by the professors of those Laws :) I could not but see the defect and want of such Books in our Law: for surely they are as necessary in the one as in the other.*

## To the Practicers

*And altho' I cannot compare my weak Endeavours with those Excellent and Methodical Works, theirs being intire, this only quasi an Abridgment, fitted for use, not for show : Yet until more learned and judicious Proficients in our Law shall undertake the Work, I thought fit to produce mine.*

*To compare this sort of Tryal by Jury, with the Tryals of other Laws and Countries, and declare how much and wherein it excels 'em all, after Fortescue de laudibus, &c. and his learned Commentator ; would be like the arrogance of Limning after Apelles, and requires the room of a Volume, rather than an Epistle. And considering my own insufficiencies, I shall praise it more by saying nothing, than all I can: for to say less than a thing deserves, would be, instead of an Encomium, a disparagement. Therefore I shall content my self, only to say, That Tryals in other Laws are by Witnesses only, privately examin'd ; This, by Witnesses  
pub-*

of the Law.

*publickly examin'd and confronted ; and by Jury also, and so consequently the fact is settled, with the greater certainty of truth, upon which the uprightness of the judgment depends.*

*It would be well if there were less corruption in the returning of Juries ; but I think 'tis parallel'd, if not exceeded by that of examining Witnesses privately, on whose Depositions, the Tryals in other Laws consist : And so that must be no Objection against the thing. I hope an Expedient may be found out to prevent the Corruption in returning Juries, but I believe it never can in the other.*

*To say this Tryal by Jury is too popular in a Monarchy, would be a good Objection from a French-man, but not of any English-man, who lives under the best tempered Monarchy, and the best sort of Government in the World, to which this manner of Tryal is so proper and well Accommodated, that neither the Wisdom of our Ancestors could,*

To the Practicers, &c.

*could, nor (I may say) can this present, nor after Ages invent a better.*

*But as the unskilful Painter drew a Curtain, before what he could not express with his Pencil, so must I vail with silence, the Excellencies of this Celebrated Tryal, which I am not able to delineate.*

Gentlemen,

*To make an Apology for the stile of a Law-Book, especially of an Epitome, would be a vain thing, Ornari res ipsa negat contenta doceri; neither shall I make any Apology for my undertaking this Work: If 'twas better perform'd, yet Momus wou'd be carping; and if 'twas worse, it wou'd be good enough for him, who cannot, or will not do it better: Be it what it will, your kind Reception will abundantly satisfy*

Your Servant,

G. Duncombe.

THE

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T H E  
PREFACE  
T O T H E  
FIRST EDITION.

**T**H E Philosopher could not see a Man unless he heard him speak; *Loquere ut videam.* Speech is the Index of the Mind, and the Mind only discriminates the Man. For, although an *Idiot*, who hath but the shape of a Man, may with silence so hide his Folly, that strangers to his Manners cannot discern him from a Sophister: Yet doubtless, Silence is the greatest Enemy to Learning, the Grave wherein Oblivion buries the Parts and Knowledge of the bravest Spirits.

Where-

## The Preface.

*Histor. facil.  
Princeps.*

Wherefore Learned Salust, from this takes his Exordium; *Omnes homines qui sese student præstare ceteris animalibus, summa ope niti decet, ne vitam silentio transeant, veluti pecora:* Those Men who would excel Beasts, should labour that their Lives might not pass in such silence, as Beasts do. It seems he deemed that Man little inferior to a Beast, who acted nothing to prolong his Memory: For this he held to be the Duty of every Man, saying, *Quo mihi rectius esse videtur, ingenii quam virium opibus gloriam quærere; & quoniam vita ipsa, qua fruimur, brevis est, memoriam nostri quam maxime longam efficere:* In my Opinion, 'tis far better to acquire Glory by the Riches of Wit, than Strength; and because our Lives are short of themselves, we should endeavour by Ingenuity to Eternize their Memory.

*Nulla dies sine  
linea.*

And to effect this, *Nulla dies abeat, quin linea ducta supersit;* No day should pass over our Heads wherein we should not act some memorable Exploit: Men should not live like *Snails*, never stirring out of their Houses; but be active (I mean not busie-bodied in other Mens matters, but) in

their

## The Preface.

their own Callings, of which the Wise Cato tells us, Every Man should give a reasonable Account : And if we believe the famous Seneca , *Nil est turpius quam grandis natu senex , qui nullum habet vitæ suæ argumentum, quo diu se vixisse dicat, præter etatem* : Nothing is more unworthy than an old Man, who has nothing to shew for his Antiquity, but a Gray Beard ; whose Soul served only as Salt to keep his Body sweet, and is no sooner dead, than forgotten, long before he is half rotten ; yet who is so apt to deride the Endeavours of other Men, as this Ancient Ignoramus, whose wrinkles in his Face, worn-out Looks, and many Years, sway more with the vulgar People, than all the Arguments of Law or Reason ? Had Seneca been such a silent Momus, the World would never have been blest with his so Learned Works. And doubtless writing Books is needful in no Science more than in the Law. For without Books, how would the Lawyers do for Arguments at the Bar, or Resolutions at their Chambers ? whence the Oracle Sir Edward Cook pronounces this, *Omnes debere Juris-prudentiæ libris componendis animum adjicere* : That all Men ought to ad-  
dict

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dict themselves to the Composing Books of Law; some to the Reporting of the Judgments and Resolutions of the Judges, who are *Lex Loquens*; and some to the Collecting of these Cases and Resolutions, methodizing and fitting them for some particular purpose, as *Littleton*, *Stamford*, *Fitzherbert*, *Crompton*, *Perkins*, *Finch*, &c. And indeed, most of the Law-Books extant, if not all (setting aside the Reports) are nothing else, but Collections out of others. This I speak, not in derogation of them, in the least; for as 'tis equally, if not more laborious, so 'tis full as glorious, judiciously to cull Authentick Cases out of the Volumes of the Law (where so many are no Law) and rightfully place them in a particular Treatise, as 'tis to Report the Judgments and Resolutions from the mouth of the Court; for the Reporter is but the Courts Secretary, and *Cook's Institutes* merit as much as his Reports; and *Ash's Tables*, *Fitzherbert* and *Brook's Abridgment* are as useful as the Year-Books themselves, of which kind of Collections, one Elegantly thus breaks out, *Quo quidem beneficio, haud scio, aut aliud aut legum Can-*

## The Preface.

*Candidatis magis gratum, aut Reipublicæ  
magis commodum, aut divini honoris  
illustrationi magis idoneum, vel cogi-  
tando quidem consequi, quisquam poterit.*

Than which benefit I knew not whe-  
ther any Man can even imagine ano-  
ther, either to Lawyers more grate-  
ful, or to the Commonwealth more  
profitable, or for the Illustration of  
Divine Honour more fit. For with  
the least Labour, a small Price, and  
little Time, they present you with  
those Resolutions and Judgments  
which lye scattered in the Volumi-  
nous Books of the Law; which would  
otherwise cost much Time, Pains and  
Charges to find out: The thoughts  
of which publick good, first gave life  
to these Endeavours of mine: Not  
that any one should in the least ima-  
gine, that I am so guilty of vain  
Ostentation, as to believe, that my  
Parts or Abilities can perform any  
thing in this kind like other Men:  
No, *Ipse mihi nunquam Judice me pla-  
cui.* I could never yet please my self  
with my own Labours, much less are  
they worthy to please others; *haud  
quidem tali me dignor Honore.* How-  
ever, when I consider, that no Man  
hath yet written particularly con-  
cerning

## The Preface.

cerning this Subject, and of what general Use it is; I doubt not but that this Treatise will receive a favourable Construction from most men, and a plausible Acceptation from others.

The use of  
the Book.

The Use of it is in a manner Epidemical; since most mens Lives and Estates are subject to that Tryal *Per Pais*, here demonstrated; but in particular, the Practisers at Law (especially *Circuit-Advocates, Attornies, Solicitors, Clerks, &c.*) And all *Jurors*, (for whose Directions it is of singular Use) are chiefly concerned herein. But I will not hang a Bush out, to invite, and prepossess your Judgments, *Vincal Utilitas*. The profit which every ingenious Reader shall gather out of it, will speak more for it, than the best Eulogical Preface.

And for my own part, I profess myself to be *Philomathes*, but not *Polymathes*. And notwithstanding the hard-favoured Objections which some men cast upon it, I really think the Study of the Law, to be the most pleasant Study in the World. And he which delighteth in the Study of any other Art or Science, must consequently be delighted with this. For the know-  
ledge

### *The Preface.*

ledge of the Law, as *Doderidge* saith, is most truly stiled, *Rerum Divinarum humanarumque scientia*, and worthily imputed to be the *Science of Sciences*; for therein lies hid the Knowledge of every other Learned Science.

So that he which gives himself to the Study of Divinity, may here fill himself with holy and pious Principles of Divine Laws: For, *Lex est sanctio*

*Fortescue,*  
Cap. 3.

*sancta, jubens honesta, & prohibens contraria; sanctum etenim oportet, quod esse sanctum definitum:* The Law is a holy Sanction, or Decree, commanding things that be honest, and forbidding the contraries: Now the thing must needs be holy, which by definition, is determined to be holy. So that in this respect, saith *Fortescue*, men may well call Lawyers, *Sacerdotes*, that is, givers or teachers of Holy Things. For the Laws being Holy, it follows that the Ministers and setters forth of them, must be givers of Holy Things; and so by Interpretation doth *Sacerdos* signifie; and doubtless he which, duly considers those Rules of *Theology*, which lye scattered throughout the whole Body of the Law, must needs conclude our Laws to be Commentaries upon the Old and New Testament; and do so

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much

## The Preface.

much bear the Image *Legis Divine*, that they may well be attributed to the most High.

The Rules of *Grammar*, *Philosophy Natural*, *Political*, *Oeconomick* and *Moral*; as also the Grounds of *Logick*, and of other Arts and Sciences, so much abound in our Books, that the very reading of the Law will make a man *Master* of those Sciences.

And since *Rhetorick* is, *Ars ornate dicendi*, and consisteth of those two parts, *Elocution*, and *Pronuntiation*; How can we read in our Law-Books, those learned Arguments, Elegant Speeches and Judgments, pronounced with such Eloquence and Elegance of words and matter, and not conclude, That *Rhetorick* is the Glory and Grace of a Lawyer? though some (not gifted that way) would perswade us, that the Law hath little relation to it.

If any man be delighted in History, let him read the Books of Law, which are nothing else but Annals and Chronicles of things done and acted from year to year, in which every Case presents you with a petit History; and if variety of matter doth most delight the Reader, doubtless, the reading of those Cases, (which differ like mens faces)

### *The Preface.*

faces) though like the Stars in number, is the most pleasant reading in the World.

I thought to have expatiated my self in this Eulogical Commendation of the Study of the Law ; but when I consider the Glory of the thing it self, I think it but in vain to light the Sun with Candles ; and as no Arguments will perswade one to love against Nature ; so he whom the excellency of the Law it self cannot invite to Study it, will never be forced to it with the fist of Logick , or other persuasion : Wherefore 'tis now time to expose my self to the Censure of the Reader, who always judges according to his Capacity or Affection ; for which cause, if I were to chuse my Reader, I could wish with *Caius Lucilius*, *Quod ea quæ Scribo , neque ab indoctissimis, neque a doctissimis legi , quod alteri nihil intelligerent, alteri plus fortasse, quam ipse de se :* That this Treatise might not be read of the most learned, nor of those who are not learned at all, because these understand nothing, and the others more perhaps than my self.

## The Preface.

Bracton, Lib. I.  
Fol. 1.

However, I put this Request to all,  
*Ut si quid superfluum, vel perperam po-*  
*situm in hoc opere intervenerit, illud*  
*corrigant, & emendent, vel Conniven-*  
*tibus oculis pertranseant: Cum omnia ha-*  
*bere in memoria, & in nullo peccare,*  
*divinum sit potius quam humanum:* That  
if any thing be superfluous, and plac-  
ed amiss in this Work, That they will  
either correct and amend it, or with-  
out carping connive at it; since to  
remember to do all things right and  
nothing amiss, is rather the part of a  
God than Man: Wherefore, let him  
which never offended, cast the first  
stone.

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# Tryals per Pais.

## C A P. I.

The Derivation of the Word [*Jury*.]  
The Definition, Antiquity and Excellence of Juries.

**J**urie (Jurata) cometh of the French word [*Jurer*, i. e. *Jurare*.] And signifieth in Law, those twelve Men who are sworn Judges in Matters of Fact, evidenced by Witnesses, and debated before them: I call them Judges, because, as tis the property of the Court, *ius dicere*; so tis in the power of the Jury to determine the fact, upon an Evidence Pro and Con; according to those common Adagies, *Ad quæstionem Juris respondent Judices*; *Ad quæstionem facti respondent Juratores*: And as the Judgment of the Court ought to be guided by the Law, so is the Verdict of the Jury by the Evidence. They of the Jury are called *Juratores*, *Jurors*, a *Jurando*, as in ancient *Legis Sacramentales a Sacramento præstando*.

*Vid. Cap. 12.*  
*Jurie.*

*Vid. cap. 15.*

The Antiquity and Excellency of Juries.

I need not here divide and shew the differences of Juries, nor the several sorts, they being so well known, viz. The Grand Jury, or Great Inquest, and Petty Jury, or Jury of Life and Death, in Criminal Causes, and in Civil Causes the Assize Jury. Inquest of Office, by some called Inquest of Jury, and Inquest of Office. Something concerning each of these, will incidently be spoken of in what follows. As to the excellency of Juries, it appears from their Antiquity.

Sir Henry Spelman, verb. [Inquestio] says, Tryal by Juries was used in England, *Normannis nondum ingressis, Leg. Ed. Confess. ca. 38. Postea inquisisset Justitia, i. e. [Justitarius] per Lagamannos, i. e. [legales homines] & per meliores homines de Burgo, vel de Villa, vel de Hundredo, ubi mansisset Emptor, &c.*

For as to Tryal by twelve Men, though Mr. Daniel and Polydore Virgil deny it to be older than the Conquest, and the latter says there is no Religion in it, but in the number; yet he stands fairly corrected, by that Excellent and Learned Antiquary, M. Camden p. 153. who says, Whereas Polydore Virgil writeth, That William the Conqueror first brought in the Tryal by twelve Men, there is nothing more untrue; for it is most certain and apparent by the Laws of Ethelred, that it was in use many years before, &c. And whereas Lamb. verb. [Centuria] says, *In singulis Centuriis Comitia sunt, atque liberæ Conditionis viri duodeni, ætate superiores, una cum præposito Sacra tenentes jurento*

se adeo virum aliquem innocentem haud damnaturus, fontemve absoluturos, he refers to the Laws of Ethelred, cap. 4. cited by the learned Spelman, verb. [Jurata.]

And to the same doth my Lord Coke refer, Com. super Lit. 155. and Preface to his third and eighth Report. And as to the Religion in the number of twelve, my Lord Coke gives instances ubi supra, and Sir Henry Spelman, in verb. [Jurata] supra, makes addition thereto.

So that I may truly say, Tryals by Juries have been used in this Nation, time out of mind, and were contemporary and coeval with the first Civil Government thereof and Administration of Justice; for amongst the first Inhabitants, the Britains, the Freeholders were used in all Tryals.

And Tryal by Juries was (as you see practised by the Saxons) continued by the Normans, and confirmed by Magna Charta. And was ever so esteemed and prized in this Island, that no Conquest, no change of Government ever prevailed to alter it.

'Tis true, Tryals by Juries before the time of H. 2. were not so frequent, because of Purgationes, Ordalia, Tryals by hot Iron, hot Water, cold Water, Duels, and other superstitious ways were then in use; but Tryals by Juries were here in the Saxon time, and were found here, and not brought in by William the Conqueror from Normandy: nay, rather settled by Edward the Confessor in Normandy, where he a long time was, and taught many Laws, as you

may see in the Book of the Customs of Normandy.

Glanvil lib. 2. cap. 7. says, *Ex æquitate autem maxima prodita est legalis ista institutio*, speaking of these Tryals in opposition to Duels, &c.

The use of  
Juries.

Their general use (being the only Tryers of Choses in fait, almost in all Courts throughout England) speaks them a publick good. To be Tryed by ones Peers is the greatest privilege a Subject can wish for, and so excellent is the constitution of the Government of this Kingdom, that no Subject shall be Tryed but by his Peers. The Lords by theirs, the Commons by theirs, which is the Fortrels and Bulwark of their Lives, Liberties and Estates; and if the good of the Subject be the good of the King, as most certainly it is, then those are Enemies to the good of the King and State, who attempt to alter or invade this Fundamental Principle, in the Administration of the Justice of this Realm, by which the Kings Prerogative has flourished and the just Liberties of the People have been secured so many Ages.

And what answer shall I make to the Princes, vehementer admiror, videlicet, *Utherfore* are not Juries used in other Countries, if they are so good? but that of Fortescue, the Learned, who best could tell scil. What other Countries can scarce produce one Jury so well accomplished with Wealth and Ingeny, as one County, nay, one Hundred can in England.

Fortescue  
ca. 29.

But not to dwell in the Porch, I will address my self to the Gravity of the Law, where you must not so much expect the flash of Rhetorick as the light of Reason; no, the Law knows best how to express her self in her own Terms; wherefore all other Sciences must learn, with reverence, to keep their distance, and, as (as the Golden Finch sings) be glad to have their sparks raked up in her Ashes. Things, not Words, most regarded in the Law.

*Finch. c. 3.*

And since an Issue is previous, and the matter of a Tryal, I shall first give you the description thereof, and then touch upon the several Tryals allowed by the Law, for the discussion of the truth.

## C A P. II.

Of an Issue, and the divers sorts of Tryals thereof; and when a Tryal shall be by a Jury, and when not; when by Certificate, when by the Spiritual Law, when by Battail, and when by an Almanack; what Issue shall be first tryed, *per pais*; what shall be tryed by the Court; and what by Examination of the Attorney, Sheriff, &c.

*I Inst. f. 126.  
Omnia unum  
aliquem sorti-  
untur exitum,  
vel per patri-  
am, vel per  
Judices termi-  
nandum.  
Finch. Epistle.*

**I**ssue, *exitus*, saith Coke, is a single, certain and material point, issuing out of the Allegations and Pleas of the Plaintiff and Defendant, consisting regularly upon an Affirmative and Negative, to be tryed by Twelve Men: And it is two-fold, scil. either special, as where the special matter is pleaded; or general, as in Trespass Not Guilty: In Assize, nul tort, nul disseisin, &c. And as an Issue natural cometh of two severall persons, so an Issue legal, issueth out of two severall Allegations of adverse parties.

Tryals.

And to give you likewise his definition of Tryal, It is to find out, by due examination, the truth of the point in issue, or question between the parties, whereupon  
Judge

Judgment may be given: and as the question between the Parties is two-fold, so is the Tryal thereof; For either it is *questio juris*, (and that shall be tryed by the Judges, either upon a Demurrer, Special Verdict or Exception: For, Cuilibet in sua arte perito est credendum, & quod quisque noverit, in hoc se exerceat.) Or it is *questio facti*, And the tryal of the fact is in divers sorts; First, chiefly, and most commonly, by a Jury of twelve Men, (of which kind of tryal, my intencion is principally to treat in this Book.)

Note, That upon a Demurrer to part, and Issue to part, though it is the best way to give Judgment upon the *questio juris* first, yet the Court may try the *questio facti* first, at their discretion.

1 Inst. 72. 125.

Lach 4. Rolls clt. Tryals, 626. 723.

For by twelve Men are matters of Fact Proceedings (for the most part) tryed with us in Eng- In Civil land, in Causes both Criminal and Civil; Causes. in Causes Civil, after both Parties have said what they can, one against another, in Pleading, if there arise a question about any matter of Fact, it is referred to twelve indifferent Men, to be Impannelled by the Sheriff, and as they bring in their Verdict so Judgment passeth. And this the Judge is to declare as the Law is upon the Fact found: For the Judge saith, the Jury finds thus, and then the Law is thus, and so we judge. For the Law arises upon the Fact.

For Criminal Causes, the course is thus; Proceedings At the Kings-Bench for Middlesex, and at the in Criminal great and general Assizes, and at the gene- Causes. ral Sessions of the Peace, there is one Jury called the Grand-Jury, which consists commonly of twenty four substantial Men, one

of every Hundred within the County returned by the Sheriff, and they are to consider of all Bills of Indictment presented to them, which they either approve of by writing *Billa Vera*, or disapprove by writing upon them *Ignoramus*; and those which they approve of are to be tried by another Jury called the *Petit-Jury*. The *Grand-Jury* may charge any person, upon their own Presentment, which will be of the force of an Indictment, and the Party charged may *Traverse* the Offence, and bring it to be tried by a *Petit-Jury*.

Some lesser Matters in these Courts are proceeded upon without a Jury, and some things are removed by *Certiorari* into higher Courts, and then must be tried there; and that thing to which there is a *Traverse* put in, must be tried and ended by a *Petit-Jury* which (for the most part) in all Civil and Criminal Causes are but twelve Men, which ought to be *Free-Men*, not *Villains* or *Aliens*, and lawful Men, not *Outlawed*, and also Men of worth and honesty.

But because it is necessary to be known, that there are many ways allowed by the *Common-Law* to try matters of Fact, besides this by Juries, I will here repeat some of them: And for this first hear the Oracle, who tells you, that he had read of six kinds of Certificates allowed for Tryals by the *Common-Law*.

1 Inst. f. 74.

Tryals by  
Certificate.

1. The doing of Service by him that holdeth by *Escuage* in Scotland, was to be tried by the Kings Marshal of his Army,  
Per

Per son Certificate en escript south son  
seal que serra mis a les Justices, sayth Lit-  
leton.

2. If it be alledged in avoiance of an  
Outlawry, that the Defendant was in Pri-  
son at Burdeaux, in the service of the Mayor  
of Burdeaux, it shall be tryed by the Cer-  
tificate of the Mayor of Burdeaux. Note,  
this was when Burdeaux was parcel of the  
Dominions of the King of England. Rolls  
tit. Tryal, f. 583.

3. For matters within the Realm, the  
Custom of London shall be certified by the  
Mayor and Aldermen by the mouth of the Re-  
corder. vide apres 17.

4. By the Certificate of the Sheriff, up-  
on a Writ to him directed, in case of  
Privilege, if one be a Citizen or Foreign-  
er.

5. Tryal of Records by Certificate of  
the Judges, in whose Custody they are  
by Law. All these be in temporal Cau-  
ses.

6. In Causes Ecclesiastical, as Loyalty  
of Marriage, general Bastardy, Excom-  
munication, Profession: These and the  
like, are regularly to be tryed by the Cer-  
tificate of the Ordinary, vide apres 16.

If the Defendant claim his Privilege as  
Scholar of the University of Oxon, of such  
Colledge or Hall: this shall not be tryed  
by Certificate, but per pais. Rolls tit. Tryal.  
83.

Concerning Certificates of Spiritual Per-  
sons, vide Rolls ibid. 591, 592.

Records.

Mixt with  
fact.Rolls tit.  
Tryal. 574.

Why there  
needs no  
*visne*, where  
Letters Pa-  
tents were  
made; other-  
wise in plead-  
ing Deeds.  
4 Rep. 71.

7. A Record shall be tryed by the Record it self, and not per pais. But matter of fact concerning a Record is tryable by a Jury, as whether a Plaint, &c. was levied according to the Custom; & non prosecutus est ultimum breve, is tryable by the Country. Hob. 244. Hutt. 20. So if a Statute hath two Seals, or but one, 1 Leon. 229. 2 Cro. 375. 1 Inst. 125. b. So in a per que servitia, if the Tenant say he held not of the Conusor jour del note levie, shall be tryed per pais. In Escape upon a Capi returned, ne unques in son gard, shall be tryed per Record; but upon a Capias not returned, the prisal shall be tryed per pais. So shall an Action brought by Covin, for the Covin is not of Record. In a scire facias per Roy to have execution of a Judgment in a Quare impedit, if the Defendant say, That after the Recovery the King presented, & issint Judgment execute, and the issue be whether the King presented, per cause del Judgement, or of an avoidance after the death of J. S. who was presented by a stranger after the avoidance, upon which the King had Judgment; this shall be tryed per pais. And for this reason, in pleading of Letters Patents, the place need not be alledged where the Letters Patents were made, because the Defendant cannot plead nul tiel Record, but must plead, non concessit, and then the Jury shall come from the place where the Lands lie. Vide li. 6. f. 15. 1 Inst. 117, 260. Plo. Com. 231. But upon a Non est factum pleaded to a Deed, there must be a place alledged where the Deed was made, because (though the Deed, as to the matter of Law,

be tryable by the Court, yet) the sealing and delivery thereof, and other matters of Fact must be tryed by the Jury; so that in this Case of a Deed, there is a Tryal per Pais, and by the Court. 1 Inst. f. 35. Vide apres 18.

The issue upon an Indictment of Acquittal upon this shall be tryed by the Record. So shall the allowance of a Protection in Bank. The Imprisonment upon the Execution, and not for other cause, in escape. The justification of an Imprisonment, because he is a Justice of Peace. A Statute-Merchant, Count or not Count, Baron of the Parliament, or Vicount or not. Whether a place be within the Ligeance of the King of England, or in Scotland. A Fine for release rendering his Body in discharge of his Bail, shall be tryed by the Record. Rolls tit. Tryal 574.

What Issues shall be tryed per Record.

But in Escape against the Mayor of a Staple for suffering J. S. in Execution upon a Statute Staple to go at large, if the Defendant say he was not in Prison upon the Execution, but upon a Plaint there, this shall be tryed per pais and not per Record, because 'twould be unreasonable that the Defendant should certify a Record, where he himself was concerned. ibid. The time of inrolling Letters Patents shall be tryed per pais. Co. Lib. 4. 71. 9 H. 7. 2.

What per Pais.

Disseisin of an Office in any Court, or raising a Record in any Court, by the Fines and Attornies of the Court.

Office raising a Record.

Peers.

The Lords  
may command  
a Jury to be  
Impannelled  
to try misde-  
meanors.

12 Rep. 93.  
Lamb In f.  
520. 3 Inst. 30.

Customs of  
Courts, &c.  
tryed by the  
Judges.

8. A Peer of the Realm, i. e. a Lord of the Parliament shall upon an Indictment of Treason or Felony, misprision of Treason, and misprision of Felony, be tryed by his Peers, without Oath, 1 H. 4. 2. But in Appeal at the Suit of the Party, he shall be tryed per probos & legales homines Juratores. 10 E. 4. 6. &c. because that is not the Kings Suit, but the Parties. Vide lib. 9. 31. Le case del Abbot de Strata Mercella. And in a Præmunire, his Tryal shall be per pais. Bolstr. 1 part. 198. Dutchesles, Countesses, or Baronesses, although Married, shall be tryed as Peers of the Realm are, but so shall not Bishops and Abbots. Stam. 153. 20 H. 6. 9. 2 Inst. 48, 49, 50. 156. b. 294. 2 Inst. 30. But Bishops shall be tryed by the Peers in Parliament.

9. The Customs and Usages of every Court shall be tryed by the Judges of the same Court, if they are pleaded in the same Court, ibid. and many other things are tryed by the Judges, as the reasonableness of a Fine of an Offender, or upon Surrender of a Copyhold Estate; and so it is of Customs, Services, and also of the time that a Tenant at will shall have to carry away his Goods; and these Cases come under the Rule which makes matter of Law to be tryed by the Judges; vide 1 Inst. f. 56. And in some Cases matter of Fact shall be tryed by the Judges, as if the Plaintiff appear by Attorney in Court, and then the Defendant pleads that the Plaintiff is dead; If one appears, and saith he is the Plaintiff, whether he is or not, shall be tryed by the

the Judges lib. 9. 30. So the Non-age of an Inspection.  
Infant, generally by inspection of the Court.

But in many Cases Infancy shall be tryed  
per Pais, as if an Infant appear by Attozny, V. Bulst. 1 par.  
in Error, this shall be tryed per Pais, li. 9. 131.  
31. and so it is in an Estate probanda. Rolls Tit. Try-  
als 571.

Maihim, In an Appeal of Maihim the Maihim.  
Court may adjudge this upon the View, at  
the prayer of the Defendant, and this  
Tryal is peremptory to the Parties, by a  
Jury of Chirurgeons. Vide Rolls Tit. Tryals  
578.

Maihim may be tryed again by the  
Court, by inspection for increase of Damages;  
but then these things are to be considered,  
First, It must be a Maihim, and not a bare  
Wounding. Secondly, The Maihim must  
be ascertained in the Declaration, so as that  
it may appear that the Maihim inspected, and  
the Maihim in the Declaration be all one, Maihim.  
as was resolved, Mich. 21 Car. 2. B. R. in  
the Case of Badwel and Burford, the prin-  
cipal Case of which was, That the Defen-  
dant whip'd the Plaintiffs Horse, which  
made him throw her, and another Horse  
trod on her, and maim'd her Hand, and  
adjudged no increase of Damages in that  
Case being a consequential, and not a direct  
Maihim.

Non-age in a Writ of Error to reverse a Tryal by In-  
Judgment or a Fine of the Tenant by re- spection be-  
ceit of one vouched come deins age, & if- cause of Re-  
sint prairie le parol a demurrer, Non-age sur cord.  
aid prairie in Appeal, Audita Querela, to avoid  
a Statute, Recognizance, Accompt, and in all  
Actions where 'tis prayed that the parol  
de-

demurroit, Non-age shall be tryed per Inspection. But in Accompt against one of full Age, if he plead Non-age when he was Bayly, this cannot be tryed by Inspection, Rolls Tit. Tryals 572. how this Tryal by Inspection shall be, vide Rolls ibid. at large.

In all Cases where the matter may be tryed by Inspection, Examination or Discretion of the Justices, if they doubt the matter, they may refuse to try this, and compel the Parties to a Tryal per Pais, or other proofs, 21 H. 7. 40. per tous Justices.

Tryals by  
Witnesses and  
Proofs.

V. 4 Inst. 278.

Glanvil lib. 13.  
cap. 18.

Appeal.

10. There are many Tryals allowed by the Common Law, by Witnesses only, without a Jury, as of the life and death of the Husband in Dower, so the proof of a Summons, or the Challenge of a Juror, must be tryed by Witnesses; and regularly, the proof ought to be by two or three Witnesses, 1 Inst. 6. and divers other things must be tryed by examination of the Parties and Witnesses, as the Tryal by Wager of Law, &c. Finch 423.

Non-age was anciently tryed by the Oath of eight Men, but now by Inspection, and full age by twelve Men.

In an Appeal by a Feme of the death of her Husband, if the Defendant say that the Baron is alive in another County, or generally, that he is alive, this shall be tryed per proofs, 41 Affise 5. Vide Rolls Tit. Tryal 577. what shall be tryed by proofs in an Affise, and what not.

In a Writ of Annuity if the Defendant Annuly.  
 by the Party is dead in Britain, this shall  
 be tryed per proofs, 26 E. 3. 70.

11. Duke or no Duke, Earl or no Earl, Dukes, &c.  
 Baron or no Baron, shall be tryed by the  
 Kings Writ, lib. 5. 35. lib. 6. 53. But  
 Dutchess or no Dutchess, &c. by Marriage,  
 shall be tryed per Pais, because the Marriage  
 is matter of fact.

12. In a Plea del alien nec, the League League.  
 between the King and the Sovereign of  
 the Alien, shall be tryed by the Record of  
 the Chancery, for every League is of Record,  
 p. 9. 32.

13. If a Mannor be antient demesne, or not, Mannor.  
 shall be tryed by the Book of Doomes-  
 day, which is in the Exchequer. But whe-  
 ther certain Acres be parcel of such a Man-  
 or, or no, it shall be tryed by the Coun-  
 try, ib.

14. The Proceedings of a Court which Courts not of  
 not of Record (as the Countey Court, the Record.  
 Hundred Court, the Court Baron, &c.) shall  
 be tryed by the Country, and not by the  
 Rolls of the Court, because they are no Re-  
 cord, ib. Co. Lit. 117. b.

The Priviledges and Libertis of Courts By Charters  
 of Record, Cities and Boroughs must be and Records.  
 tryed by their Charters and Records.

15. Whether the Ordinary committed Ad- Wills and Ad-  
 ministration to the Plaintiff, or whether the ministrations.  
 Testament was proved before the Ordinary,  
 whether such a Will be the Will of the  
 Party, or whether he died Intestate, or not?  
 In all these Cases the Tryal shall be per  
 Pais, because probate of Wills, and consti-  
 tuting

tuting Administratozs, did not belong to Ecclesiastical Judges originally, but were given to them of late. But the Tryal thereof is left to the Common Law, and was not given to them, lib. 9. 32, 40.

An Executor brings an Action of Debt, the Defendant pleads that the Testator never made him Executor, if the Plaintiff gives in Evidence the Probate of the Will, the Defendant shall only give evidence in disaffirmance of the Plaintiffs Probate, which is matter of Fact; but as to matter of Law the Court gives credit thereto, as where another Will was made, for there the Parties might have appealed; but if the Seal be counterfeit, or the Probate forged, its tryable per Jury, Adj. Pasch. 20 Car. 2. B. R. Noel and Wells. vide Wentworths Executor 69.

**Criminal  
Matters.**

The Tryal of all Criminal Matters is by the Country, and the Party accused cannot be denied it, unless it be his own fault, as where he is mute, and will not put himself upon his Country in due time, for then without farther Tryal Judgment de pain & dure is passed by the Judges upon him, Stamf. Pl. Coron. 150.

**Plo.Com. 267.  
Special Bastardy.**

16. In an Action upon the Case for calling one Bastard, the Defendant justified that the Plaintiff was a Bastard; And it was awarded that this should be tried per Pais, and not by the Ordinary, Hob. 179. Devant 6. And so a Plea that the Plaintiff was born at such a place before Marriage, this is special Bastardy, and shall be tried per Pais. Plow. 14. Dyer 89. vide hic cap. 22.

17. *Where*

17. When an Issue is taken, whether a Custom or no Custom in London, If the Mayor, Commonalty and Citizens be Parties, or interested in the Action, This Custom shall be tryed by a Jury, and not by the Certificate of the Mayor and Aldermen, by the Recorder, Hob. 85. Day and Savages Case. Devant. 3. Stiles 137. Moor 71. vide apres tit. Visne. Rolls tit. Tryal 579, 80.

The Custom of London shall be certified by the Mayor and Aldermen, by the mouth of the Recorder, Co. Lit. 74.

In an Information upon the Statute Eliz. for using a Trade, to which the Defendant was not bound Apprentice, If the Defendant plead a Custom of the City, That he who is free of one Trade, may use any other; this shall be tryed by the mouth of the Recorder.

Note this difference, He that is free of the Manual Trade cannot use another Manual Trade: but it is otherwise of those Trades which are not Manual. In such, he that is free of one, may use another by the Custom.

Liberties claimed by Custom in London, the Custom of making Indentures of Apprenticeship void, if not Inrolled within a Year; The Custom to devise Lands, Foreign Attachment, &c. shall be tryed by the mouth of the Recorder. But the Issue whether there be a Market every Day of the Week in London shall be tryed per Pais, because the Issue is not upon the Custom, Rolls tit. Tryals 580. vide hic cap. 8.

Matter of Record mixt  
with matter  
of Fact.

Tryals by  
Battel.

Writ of Right

Grand Assise.

18. A matter of Record being mixt with a matter of Fact, shall be tryed per Pais, and not by the Record, Hob. 244. Peter and Staffords Case, Devant 7.

19. In Writs of Right, and Appeals that touch Life, Tryal may be by Battel, or by Jury, at the Defendants choice; The Battel, in a Writ of Right, must be by Champions, (who must be Freemen,) But in an Appeal, it must be in proper Person. The Champions, in a Writ of Right are not bound to fight longer than until the Stars appear, and if the Champion of the Tenant can defend himself until then, the Tenant shall prevail: The Judges of the Court of Common Pleas, are Judges of the Battel, in a Writ of Right: and the Judges of the Kings Bench in an Appeal of Felony. It seems they seldom or never killed one another in this tryal of Battel, for their Weapons were but Battons, and he that was vanquished, was presently upon Proclamation made to acknowledge his fault in the Audience of the People, or else to cry Craven in the name of Recreantise, &c. and upon this Judgment was to be given, and after this the Recreant should amittere liberam legem, that is, should become infamous, &c. 2 Inst. 247. Finch 421. lib. 9. 31. Mirror of Justice 161, 162. &c. 1 Inst. 294.

Glanvil saith, The Tryal by Grand Assise came by the Clemency of the Prince. Et autem (saith he) Magna Assisa Regale quoddam beneficium, Clementia Principis, de consilio Procerum populis indultum.

For the Tryal of Treason, Murder and Felony as well upon Appeals, as upon Indictments, see Stamf. Pleas of the Crown.

By Glanvil cap. 1. lib. 14. it appeareth the Tryal of these Crimes by the old Law was this; If there were no direct Proof, nor Accuser, or if there was any Accuser, or direct Proof, yet if the Party denied the same, then the Tryal was by Wager of Battel, if the Party accused was not sixty years old, and of sound Limbs; but if he was older, or not sound, then he was to be tried per iudicium Dei, namely, per calidum rum vel aquam, that is, if he was a Freeman, he was to run bare foot and bare legged over a row of hot Iron Bars, and if he stood three times without stop or fall, he was acquitted. And if he was a meaner person, called Rusticus, he was to run through Vessels filled with scalding Water.

Per iudicium Dei.

20. In a Writ of Disceit, upon a Recovery by default, the Tryal shall be, if the Judgment was given upon the Petit Cape, the Summoners; if upon the Grand Cape, the Summoners pernors or veiors, and not Pais: So if a Recovery by default in real Action be pleaded, to which the other party, Nient comprise, this shall not be tried Pais, but by the Summoners and Veiors, lib. 32.

Recovery by default.  
Summoners pernors, veiors

Nient Comprise.

En Affise if the Issue be, whether the land was extended in an Elegit, &c. This shall be tried by the Extenders joined with Affise, 31 Aff. 6. vide Rolls tit, Tryal, 582.

Of Tryals per l'Escheator, per Examination, vide ib.

Escheator,  
Sheriff.

In an Appeal, if the Exigent be awarded, and the Party pray a Writ to inquire of the Goods and Chattels, and to seise them, this may be awarded to the Escheator, or Sheriff at the Election of the Court, 41 Aff. 13. vide hic cap. 24, 27.

Wager of Law

21. In Debt upon a simple Contract, De-  
tinue, &c. The Tryal may be by Wager of  
Law, or per Pais, at the Defendants Ele-  
ction. But when the Defendant wagers  
his Law, he ought to bring with him Ele-  
ction of his Neighbours, who will avow  
upon their Oath, that in their Conscience  
he saith true, so as he himself must be  
sworn de fidelitate, and the eleven de credu-  
litate. Ib. Finch 423. and 1 Inst. 295. you  
may read excellent Learning concerning  
this Tryal.

Profession.

22. If Profession be denyed, it shall be  
tryed by the Court Christian; But if the  
time of the Profession be in Issue, this shall  
be tryed by the Country, lib. 4. 71.

Inrolment.

though an Inrolment, or other matter in  
Record cannot be tryed per Pais, yet the  
time when the Inrolment was made, may

Appearance.

be tryed per Pais. So whether the Party  
appeared in such a Court, or on such a  
day, &c. shall be tryed per Pais, Cro.

Sheriff.  
Admission,  
&c.  
Plenary.

part. 131. So whether one was Sheriff for  
a day or not, Cro. 1 part 421. Admission  
Institution, Plenary and Ability of the Par-  
son shall be tryed by the Bishop. But In-  
duction shall be tryed by the Country, and  
shall Avoidance by resignation, Dyer 28.  
Mo

Moor 61. And void, or not void shall be tryed per Pais, 1 Inst. 344. And Plenarty, if the Clerk be dead, Mirror of Justice 324. li. 6. 49. The cause of refusal of a Clerk by the Bishop, shall be tryed by the Metropolitan, if the Clerk be living; but per Pais, if he be dead, 1. 5. 58.

Ability shall be tryed by the Ordinary, if the Clerk be alive, but if dead, then per Pais. *Per Spiritual Law. Vi. hic cap. 16.*  
 Institution, Resignation, full or not full; Profession, unless alledged in a Stranger. Prior removable at will, or perpetual, general Bastardy, the Right of Espousals, Divorce, &c. shall be tryed by the Bishops: but in many cases these matters being mixed with other circumstances, shall be tryed per Pais.

As if the Church be void by Resignation, or void or not void, Induction, Institution and Induction together, because the Common Law shall be preferred; Prior or not Prior.  
*Per Pais.* For although Institution, Resignation, &c. are Spiritual, yet Avoidance, Induction, &c. are notorious to the Country.

Bastardy alledged in a Stranger to the Curia, or in one dead, or Abatement of the Curia. Whether a Feme be a Feme Covert in Possession, &c. in Trespass by Baron and Feme, Nient son feme shall be tryed per Pais. And see in Rolls tit. Tryal 584. &c.  
 Many Cases where Bastardy, Marriage, &c. shall be tryed per Ley Spiritual, or per Pais. The time, &c. of Consecration of a Bishop, Bishops Certificate, *Leon. fol. 53. Leigh and Hammers Case.* *Note, Marriage of a Wife in Possession shall be tryed per Pais, but not the right of Marriage, as ne unques accouple in loyal Matrimony; this Right must be tryed by the*

and of other Spiritual Matters, shall be tryed per Pais. By what Spiritual Person the Tryal shall be, and for what cause, vide ib.

Ideot.

23. An Ideot found so from his Nativity by Office, may come in Person in the Chancery, before the Chancellor, and pray that before him, and such Justices or Sages of the Law, which he shall call to him (who are called the Council of the King) he may be examined whether he be an Ideot or no; or by his Friends he may sue a Writ out of Chancery, returnable there, to bring him into the Chancery, *ibid.* coram nobis, & concilio nostro examinand. lib. 9. 31.

Sheriff.

24. If it be in question, whether the Sheriff made such a return or not, It shall be tryed by the Sheriff: If whether the Under-sheriff made such a Return or not, it shall be tryed by the Under-sheriff; If the question be, whether such a one be Sheriff or not, he is made by Letters Patents of Record, and therefore it shall be tryed by the Record, *ib.* Cro. 1 part 421.

Dures.

25. If an Approver say, that he commenced his Appeal before the Coroner per dures, this shall be tryed by the Record of the Coroner; and if it be found that he did it without dures, he shall be hanged, *ib.* Corone br. 75.

Statute.

26. The Tryal, whether a Statute sheweth before, be the true Statute or not, shall be by the examination of the Mayor and Clerk of the Statutes, which took the Statute, and not per Pais, *ib.* Whether a Statute hath two Seals or not, shall be tryed per Pais, Leon. 228, 229.

27. In Assize the Tenant said, that the Escheator. Hands were taken into the Kings Hands, this shall be tryed by the Examination of the Escheator.

28. If one in avoidance of an Outlawry, Certificate. Ackedge that he was in Prison at Burdeaux, extra mare in servitio Majoris de Burdeaux, this shall be tryed by the Mayors Certificate; and in such like Cases, other Tryals shall be by the Certificate of the Marshal of the Messenger. Post, and by the Captain of Calice, and also by the Messenger, of a thing done beyond Sea, ib.

29. At the Petit Cape, the Tenant said Petit Cape. that he was imprisoned three days before the assault, and three days after, this shall be tryed by the Examination of the Attorney; went Attach. per 15 Jours in Assize shall Bailly. not be tryed per Pais, but by Examination of the Bailly, ib.

30. It seems an Almanack is so infallible, Almanack. that it hath counterbailled the Verdict of a Jury. For in Error of a Judgment given in Lynne, the Error assigned was, That the Judgment was given at a Court held there on the 16th day of February, 26 Eliz. and that this day was Sunday, and it was found by Examination of the Almanacks of that year: upon which it was ruled, that this Examination was a sufficient Tryal, and that a Tryal per Pais was not necessary, although it were an Error in Fact; and so the Judgment was reversed, Cro. 3 part, 227: 1 Leon. 242. the same Case, and where it was said, it was twice so ruled before.

Ordeal.

31. In ancient times there was a Tryal in Criminal Causes called Ordalium, for upon Not Guilty pleaded, the Defendant might put himself upon God and the Country (as is the use at this day) or else upon God only; and then if he was a Freeman, he was to be tryed per ignem, that is, he was to pass over Novem vomeres ignitos nudis pedibus, and if he was not hurt by this, then he was to be acquitted, otherwise condemned; and this was called Judicium Dei. But if he was a Slave, then his Tryal was to be per aquam, and that divers ways which all appear in Lambard, verbo Ordalium. From which kind of Tryal I presume we still retain this Expression of an innocent Person, That he need not fear fire or water: this manner of Tryal was first prohibited by the Canons, then by Parliament. The Tryal by Battel is likewise prohibited by the Canons, but not by Parliament, as you may read in the ninth Report, fol. 30. and in the Authorities there cited, which I therefore omit to recite here, (though I have the Books by me) and so in this whole Treatise, where I refer you to a Book, I shall not set down the Authorities cited in that Book, which will avoid prolixity.

Battel.

Which Tryal shall be first.

Tryal in one Issue binds in another.

32. When the matter alledged extended to a Place at the Common Law, and a Place within a Franchise, it shall be tryed at the Common Law, 1 Inst. 125. 4 Inst. 221.

In what Cases a Tryal in one Issue shall bind the same Party in another Issue, upon the same matter.

In Debt against two per several Præcipes, if one plead a release, and they are at issue upon the Deed, and the other plead the same Issue, if it be found the Deed of the Plaintiff in the former Issue, this shall bind him in the second Issue, 12 H. 4. 8.

In Trespals if the Defendant plead Wilful Damage in the Plaintiff, if this be found against the Defendant, this shall bind him in the same Issue, in another Action in the same Court betwixt the same Parties, 44 Ass. 5.

If a Man be found guilty of a Conspiracy upon an Indictment at the Kings Suit, this shall not bind in a Writ of Conspiracy at the Suit of the Party, but he may plead not guilty, 27 Ass. 13.

If a Man upon an Indictment of Extortion confesses it, and put himself in the Kings Grace and makes Fine, &c. this shall bind him, and he shall not plead not guilty to the Suit of the Party, for a Confession is stronger than a Verdict, 27 Ass. 57. per Sharde, vide Rolls tit. Tryal 625.

He which is not Party to the Issue nor can have attainr, or challenge the Inquest, shall not be bound by the Tryal, 11 H. 4. 30.

In what Cases  
tryal against  
one shall be  
against others.

And therefore in Trespals against two, and one pleads a Release, and the other justifies as his Servant: If the Issue be found against the Master, it shall not conclude the Servant, 11 H. 4. 30. Rolls ib. 625.

One shall not be compelled to try a Trial before the same Sessions he makes it, for a Man shall have time to make his defence, and is not supposed to be ready to answer sudden Objections, and for this reason many Judges

At what time  
the Tryal shall  
be.

Judgments upon Indictments have been reversed.

Justices of Oyer and Terminer, nor Justices of Peace cannot inquire and determine the same day. But Justices of Gaol Delivery, and Justices in Eyre may.

Justices of Peace cannot proceed to the delivery of a Person indicted of Felony before them the same day he is arraigned, 22 E. 4. Coron. 44. Declared by all the Justices of England, to be observed as a Law.

In an Indictment in B. R. or in the same County and removed thither, the Defendant may be arraigned and tryed the same day. For the Kings Bench is a Court of Eyre for all Offences in that County. Otherwise of an Indictment removed out of another County, Vide Rolls tit. Tryal 626. many Cases de cro.

Marshal Affairs.

Witnesses or Combat.

33. All Matters done out of the Realm of England, concerning War, Combat or Deeds of Arms, shall be tryed and determined before the Constable and Marshal of England, before whom the Tryal is by Witnesses, or by Combat, and their proceeding is according to the Civil Law, and not by the Oath of twelve Men, 1 Inst. 74. 261. Wherefore if the Kings Subject be killed by another of his Subjects in any Foreign Country, the Wife or Heir of the Dead, may have an Appeal before the Constable and Marshal, who sentence upon the testimony of Witnesses or Combat, ib. So if a Man be wounded in France, and die thereof in England, ib. 4 Inst. 140.

It is worthy our observation, to take notice when there are several Issues, which of them shall be first tryed; And for this you have already heard, that where Issue is joyned for part, and a Demurrer for the residue, the Court may direct the Tryal of the Issue, or judge the Demurrer first, at their pleasure, though by the Opinion of Dodrige, it is the best way to give Judgment upon the Demurrer first, because when the Issue comes afterwards to be tryed, the Jury may assess Damages for the whole.

What Issue shall be first tryed.

Latch. 4.

Damages.

A Scire facias was brought on a Recognizance in Chancery, the Terre-tenants pleaded several Pleas, the Plaintiff demurred to one, and took Issue on the other, the Record was sent into B. R. to try the Issue, and it was tryed, and Verdict pro Plaintiff, the Demurrer not being argued, and it was adjudged per B. R. that Judgment ought to be given on both by that Court, Jeffreyson and Dawsons Case, Hill. 21. 22 Car. 2. B. R. vide also these things, 1 Roll Abr. 534, 535. Rolls Rep. 287. and in the principal Case, 4 Inst. 10. was denied to be Law.

An Immaterial Issue joyned, which will not bring the matter in question to be tryed, is not helped after Verdict by the Statute of Jeofails, but there must be a Repleader; because this is matter of substance, for if there were no Issue, there could be no Verdict, and so it is as if nothing had been done in the Cause.

Immaterial Issue.

In an Action against two, the one pleads Plea to the abatement of the Writ, the other to the Writ. the Plea to the Writ shall be first tryed,

tryed; for if that be found, all the whole Writ shall abate, and make an end of the Business; for the Plaintiff ought not to recover upon a false Writ, 1 Inst. 125.

Plea to the whole first tryed.

In a Plea personal against divers Defendants, the one Defendant pleads in Part to parcel, or which extendeth only to him that pleadeth it: And the other pleads a Plea which goeth to the whole: the Plea that goeth to the whole, (that is) to both Defendants shall be first tryed, because the other Defendant shall have advantage thereof; For in a personal Action the discharge of one is the discharge of both.

Release.

Rolls tit. Tryal 628.

As for example, If one of the Defendants in Trespass pleads a Release to himself (which in Law extends to both) and the other pleads not guilty (which extends but to himself;) or if one pleads a Plea which excuseth himself only, and the other pleads another Plea which goeth to the whole, the Plea which goeth to the whole shall be first tryed; for if that be found, it maketh an end of all: And the other Defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a Plea real it is otherwise, for every Tenant may lose his part of the Land, as if a Præcipe be brought as Heir to his Father against two, and one pleads a Plea which extendeth but to himself, and the other pleads a Plea which extends to both, as Bastardy in the Demandant, and it is found for him, yet the other Issue shall be tryed; for he shall not take advantage of the Plea of the other, because one

Discharge of one discharge-eth both.

Joyn.

oyntenant may lose his part by his mis-  
lea.

Brown and Stamford Justices consulted  
with Grammmarians in things of Grammar;  
and Hulla a Batchelor of Law (tempore H.6.)  
was called into Court to shew the difference  
between precise and causative Compulsion,  
Vide Plow. 122, 127, 128.

Pasch. 16 Car.2. B.R. An Action of Trover,  
&c. was brought de sex Capitalibus fibulatis,  
Anglice six laced Colls; after Verdict for the  
Plaintiff, it was moved in Arrest of Judge-  
ment, that the Latin Words were both Ad-  
jective, and so not certain; but it was an-  
swered, that Capaital is a Substantive, and  
the Nomenclator of Westminster School was  
produced to warrant it, and it was adjudged  
for the Plaintiff accordingly, and the Court  
allowed that authority before Riders Dictio-  
nary.

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## C A P. III.

Of a *Venire Facias*; to whom it shall be directed; when to the Sheriff, when to the Coroners, when to Esliors, and when to Bayliffs; when well awarded, &c.

**H**AVING given you the Epitome of what Tryals are allowed by the Common Law, and what shall be tryed per pais, and what not; we shall now apply our selves more particularly to the Tryal by Juries. And because a *Venire facias* is the foundation and *Causa sine qua non*, of a Jury (I mean in Civil Causes; for in Criminals, as upon Indictments, the Justices of Gaol-Delivery, give a general Command to the Sheriff, to cause the Country to come against their coming, and take the Pannels of the Sheriff, without any Process directed to him; yet Process may be made against the Jury, though it is not much used. Stamford Ples del Corone 155.) I will first recite the Writ in terminis, the rather, because I intend to order my Discourse, according to the method of the Writ.

*Venire facias.*

Rex, &c. Vic: B. Salutem. Præcipimus tibi quod venire facias coram Justiciariis nostris de Banco apud Westm. tali die, duodecim liberos & legales homines de vicinet. de C. quorum

quorum quilibet habeat quatuor libras terræ,  
tenement. vel reddit. per annum ad minus,  
per quos rei veritas, melius sciri poterit; Et  
qui nec D. C. nec J. G. aliqua affinitate  
atingunt; ad faciend. quandam Jur. patriæ  
inter partes prædict. de placito, &c. quia tam  
idem D. quam prædict. J. inter quos inde  
contentio est, posuer. se in Jur. illam. Et  
habeas ibi nomina Jur. illorum & hoc breve.  
&c.

This is one of those Latine Letters, (as  
Sinch terms them, f. 237.) which the King  
sends with salutation to the Sheriff; but  
his high commands him, that he cause to come  
thelwe free and lawful Men of his County,  
to resolve the Question of the Fact, in dis-  
pute between the Parties upon the issue;  
and it is a Judicial Writ, issuing out of  
the Record, for Plaintiff or Defendant, after  
they have put themselves upon the Coun-  
try: for upon the Words Et de hoc ponit  
se super patriam, by the Defendant, or, Et  
hoc petit quod inquiratur per patriam, by  
the Plaintiff, and issue joyned thereupon,  
the Court awardeth the Venire facias, vid.  
Ideo fiat inde Jurat.

Ideo venit inde Jurat. is Error in inferior  
Courts, for it ought to be Ideo pre-  
cep. est vic. quod ven. fac. Sec. Siderfin 364.  
and it should be de visneto de D. specially,  
Reble 2 part. 350.

And if they come not at the day of the  
Writ returned, then shall go forth against  
them, an Habeas Corpora and Distringas, to  
bring them in to try the matter. The  
which

which two last Writs are usually made with this Clause, *Nisi prius Justiciarii venerint*, &c. and are returnable after the time of the Judges coming their Circuit.

Sheriff.

And first, you see it is directed Vicecomiti, i. e. to one who is Vicecomes, and hath the Regimen of the County instead of the Earl of that County, to whom once it did belong: as we are taught in the Mirror, cap. 1. sect. 3. scil. That it appeareth by the Ordinance of ancient Kings before the Conquest, That the Earls of the Counties had the Custody or Guard of the Counties. And when the Earls left their Custody or Guards, then was the Custody of Counties committed to Viscounts, who therefore are called Vicecomites.

What trust in the Sheriff.

What great Repose and Trust both the King and Laws put in this great Officer, the Oracle tells you, 1 Inst. 168. That he is Sheriff, that is, *Præfectus Comitatus*, Governour of the County; for the Words of his Patent be, *Commisimus vobis Custodiam Comitatus nostri de*, &c. And he hath a threefold Custody, *triplicem Custodiam*, viz. first, *Vita Justiciæ*, for no Suit begins, and no Process is served but by the Sheriff. And he is to return indifferent Juries for the Tryal of Mens Lives, Liberties, Lands, Goods, &c. Secondly, *Vita Legis*, he is after long Suits and chargable to make Execution, which is the Life and Soul of the Law. Thirdly, *Vita Reipublicæ*, he is *Principalis Conservator pacis* within the County, which is the Life of the Commonwealth, for *Vita Reipublicæ Pax*.

Yet notwithstanding the height and Latitude of this great Officers Power and Trust, the Law adjudges him in many cases not capable to do so much as return a Jury; for if he be of kindred by nature, or of affinity by Marriage to any of the Parties, or (that I may say all in a little) if he be not as indifferent almost in all respects as he is whom the Law allows to be a Juror, he ought not to meddle with the returning of the Jury. But the Venirefacias shall be directed to the Coroners (or to some of them, if the residue be not indifferent) who in that case are hach Vice, Vicecom. And if the Coroners are not indifferent, then the Venire shall be directed to 2 Electores, that is, to two whom the Court shall chuse and deem fit to return the Jury; and to the return of these Elisors or Elisors, ab Eligendo, no challenge will be admitted. Bro. tit. Venire facias 14. as to the Array, but to the Polles, 1 Inst. 158. If one of the Sheriffs of London be a Party, then the Venire may be directed to the other Sheriff; if the Under-Sheriff be a Party, yet the Venire may be directed to the Sheriff, with this Proviso, Quod Sub-Vic. tuus in illo se intromittat cum executione istius brevis. 18 E. 4. 3.

Judicial Writs (say Cook and Sanders 10. 74.) may be directed to the Coroners, as the Venire facias, where the Parties are at issue; there, upon the surmise of the Plaintiff, that the Sheriff is his Cousin, and upon paper that the Venire be directed to the Coroners, for avoidance of his own delay that might happen by the challenge of the Array, the

To whom the Venire facias ought to be directed.

Coroners.

Fortescue, cap. 2. 5.

Elisors.

Challenge. Sheriff of London.

Of London or of any place, where two persons make one Sheriff.

Suggestion.

Of whom.

Coroners.

So in Eject-  
ment against  
four upon Af-  
finity of the  
Sheriff to one  
of the Defen-  
dants.  
Rolls tit. Try-  
al 668.  
Examination.

Not of the  
Defendants  
Suggestion.

The Defen-  
dant may not  
have a *Venire  
facias* to the  
Coroners.

the Defendant shall be examined whether it be true, or not, and if he confesses it, then the *Venire* shall be awarded to the Coroners; for then it appears to the Court by the Defendants confession, that the Sheriff is not indifferent; but if the Defendant denies it, then the Process shall be awarded to the Sheriff, because the Sheriffs Authority and Profit shall not be taken away, without cause apparent to the Court; but if the Defendants will alledge any such matter, and pray a *Venire facias* to the Coroners, there the Plaintiff shall not be examined, neither shall such Allegations be allowed, because delays are for the Defendants advantage, and the Defendant may challenge the Jury for this cause, and so is at no prejudice.

And see in Term. Hill. 3. H. 7. f. 5. placit. ult. In a *Quare Impedit*, where the Defendant shewed how the Sheriff was Cousin to the Plaintiff, and prayed a Writ to the Coroners, but it was denied him upon the same reason. Fitz. tit. suggestion placit. 8. Br. Challenge 153.

In the Lord Brook's Case, Trin. 1657. B. R. In Ejectment, the Court was moved, that Lord Brooks might be made Ejector, which was granted; then the Court was informed that the Lessor of the Plaintiff was High Sheriff of the County, and that the Coroner was Under-Sheriff, and it was prayed that Elizors might return the Jury; but the Court would not grant it at the prayer of the Defendant, though the Plaintiff offered to agree to it, it being in a Tryal by *Nisi prius*: but had it been in a Tryal at Bar,

Bar, they would have granted it. But the regular course is for the Plaintiff to pray it, or else the Defendant may challenge the Array at the Assizes; for it is a principal challenge, that the Kessel of the Plaintiff is High-Sheriff, or of kindred to the Sheriff, or which see Hutt. 25. More 470. Rolls Rep. 328. And it was so adjudged, Trin. 5 Car. 2. B. R. Duncomb and Ingleby, that it is a principal challenge.

In Escheatment, the Plaintiff suggested that he and one of the Coroners were all of the liberty del Countee Wigorn', and prayed Venire facias to the other Coroner; although this is no principal challenge, and the Defendant might have opposed the prayer, yet because he confessed it, the Award was well by the Coroner. So if the cause be that one of the Coroners be retained of Counsel with the Plaintiff. If the suggestion do not comprise a principal challenge, but only of favour, this is not sufficient to award Process to the Coroners; but if it be a principal challenge, as Affinity, &c. If the Defendant confesses it, the award shall be to the Coroners; if he will not confess it, then to the Sheriff, and in such case the Defendant shall never challenge the Array for that cause: so if the Plaintiff pray process to the Coroners for favour in the Sheriff, if the Defendant say that this is not favourable, he shall never challenge for favour unless de paine temps. If the Array be quashed because made by the Sheriffs Minister, who was aiding and Counsel with one of the Parties, yet the writ shall not be directed to the Coroners,

For what causes Process shall be directed to the Coroners.

but to the Sheriff, commanding him to make the Pannel by another Officer. As, Ita quod the Sheriff ne se intromittat, &c.

Note, The Sheriff may appoint a general Officer in a Court, and his return shall be good. Keeble 1st Part. 357.

If the Tales be quashed for affinity in the Sheriff, but not the principal Pannel, because 'twas made before the affinity, yet all shall be awarded to the Coroners, Scil. the Distringas of the principal Pannel, and that they return a new Tales, for there shall be but one Officer if the Array be quashed, because made but by one of the Coroners, or for affinity in one, &c. Yet the Process shall still go to the Coroners, Ita quod the Coroner se non intromittat.

To whom  
Process shall  
be directed  
for default in  
the Sheriff  
and Coroners.

If default be in the Sheriff and Coroners the Court may choose two Esliors, and if the Parties can say nothing against them, they shall make the Pannel.

But the Distringas shall not be directed to Esliors, for the Court cannot make Officers to distrain the Kings Liege People, but the King may. 8 H. 6. 12. dubitatur.

Process may be directed to the Justices Assise, by assent of Parties, not without.

When a Pannel is made by the Esliors they shall afterwards serve all Process that comes upon this, as the Sheriff should. 1 E. 4. 24. 18 E. 4. 3, 8. Rolls tit. Tryal 670. For it may be the Sheriff will distrain only those who are his Friends and be partial.

When the Process is once awarded to the Coroners, for a default in the Sheriff, if there be a new Sheriff made afterwards, who

Indifferent, yet the Process shall not revert  
but continue to the Coroners pendant le plea.  
4 H. 7. 31. Bro. tit. Venire facias 17. So  
the Entry is, Ita quod Vicecomes se non in-  
committat. 18 E. 4. 3. 8 H. 6. 12.

And therefore where the Sheriff ought  
not to return the Venire, he cannot return  
the Tales. For in Error in the Exchequer  
Chamber of a Judgment in the Queens Bench,  
the Error assigned was, because the Venire  
facias was awarded to the Coroners, for con-  
fanguinity in the Sheriff; and it was re-  
turned by the Coroner, and afterwards the  
Tales was awarded, and it was returned by  
the Sheriff, and it was tryed, and a Verdict  
given, and Judgment. And for this cause  
held to be Erroneous, and not aided by the  
statute of 32 H. 8. or 18 Eliz. Wherefore  
the Judgment was Reversed. Cro. 3. par.  
74. Bro. tit. Odo Tales 9.

I will instance one Case moze in the same  
Reports, f. 586. because it is very full in the  
point. After issue in Trespas, the Plaintiff  
for his expedition surmised, that he was Ser-  
vant to the Sheriff, which being confessed by  
the Defendant, the Process was awarded to  
the Coroners, and after Verdict, it was mo-  
ved in Arrest of Judgment, that the Tales  
circumstantibus was awarded, and returned  
by the Sheriff which was held by the whole  
Court to be good cause for staying the Judg-  
ment; for it is a mis-tryal, not aided by  
any of the Statutes, for Process being once  
awarded to the Coroners, the Sheriff after-  
wards is not the Officer to return the Jury,  
no moze than any other Man, and Process

*Venire facias*  
once directed  
to the Coro-  
ners shall not  
be to the She-  
riff after-  
wards.  
Sheriff shall  
not return the  
Tales, where  
he cannot the  
*Venire facias*.

Where the  
Coroner re-  
turns the *Vt-  
nire facias*, he  
ought to re-  
turn the Tales.

No name to  
the Return.

ought always to be returned by him, who is an Officer by Law to return it, otherwise it is meerly void. But afterwards upon view of the Record, it appeared that the Tales was returned by the Coroners, and their Names annexed thereto, wherefore it was without further question. But the Court said, if their Names had not been annexed to the Tales, yet it had been well enough; for they be annexed to the first Pannel, and it shall be intended that the right Officer return'd it and the usual course is, That to such Tale there is not any Officers Name subscribed and yet it is good enough; for it is not within the Statute of York, which appoints that the Name of the Sheriff should be subscribed but it was moved that the Record of the Poena is, That the Tales were returned by the Sheriff; but the Court held, that it was amendable, and it was done accordingly, and the Plaintiff had Judgment.

*Venire facias*  
to the Sheriff,  
after one a-  
warded to the  
Coroners.

But if the Venire be awarded to the Coroners, for default in the Sheriff, and they do nothing upon the Writ, then I suppose, upon a default discovered in the Coroners, de p[re]s[ent]e temp[or]e, the Party may shew this to the Court, and have a Venire awarded to the Sheriff, (if there be an indifferent one made in the mean time) or else to Esliors, & sic converso.

*Venire facias*  
to the Coro-  
ners, after  
one to the  
Sheriff.

In Error of a Judgment in Chester, the Parties being at issue, a Venire was awarded to the Sheriff, and at the day of the Return, it was entered Quod Vicecomes non misit breve. And then the Plaintiff prayed a Venire facias to the Coroners, for cozenage betwixt him

him and the Sheriff, which was awarded accordingly; and at the day of Tryal the Defendant made default, and there upon Judgment Error was assigned, because that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a Venire facias to the Coroners, without some cause de iustine Tempis; sed non allocatur, because there was nothing done upon the first Writ. And the Defendant having made default, it was not material. Cro. 3. part. 853.

But the Defendant might have demurred to this prayer; for if the Plaintiff pray a Venire facias to the Sheriff, he shall not challenge the Array, nor have a Venire afterwards to the Coroners, because the Sheriff is his Cousin, or for any other principal challenge, whereof he might by common intendment have conscience, when he so prayed the Venire facias; for upon shewing this cause at first, he might have prayed Process to the Coroners; but for a principal challenge, of which by common intendment the Plaintiff could not know at the first, as that the Defendant is of kindred to the Sheriff, &c. he may afterwards challenge the Array, when they appear, or if the Sheriff doth nothing upon the Writ, he may pray a new Venire to the Coroners. 15 H. 7. 9.

If the Plaintiff prays a Venire facias to the Coroner, because he is of kindred to the Sheriff, if the Defendant will not confess this, but denies it, this shall be entered, and the Defendant shall not challenge the Array for this cause afterwards. Br. tit. Venire facias 21. and 23.

No Venire facias to the Coroners, after one to the Sheriff.

If the Defendant denies the Plaintiffs suggestion, he shall have no benefit of it by Challenge.

By consent,  
the *Venire fa-*  
*cias* may be  
directed to a  
wrong Officer.

Mistrial with-  
out such con-  
sent.

*Venire facias*  
to some of  
the Coroners.

Bayliffs.

Judge and Of-  
ficer to return  
Writs.

If a *Venire facias* be awarded to the Cor-  
oners where it ought to be to the Sheriff, or  
the Visne cometh out of a wrong place, yet  
if it be per assensum partium, and so en-  
tered of Record, it shall stand, for omnis con-  
sensus tollit errorem. 1 Inst. 126. li. 5. 36.  
But if it be directed to the Coroners, where  
it ought to be to the Sheriff, without such  
consent of parties; This is an insufficient  
Tryal, not remedied by any Statute, except  
it be upon an insufficient suggestion, and then  
the Statute of 21 Jac.c.13. helps it.

Upon suggestion that the Plaintiff and  
the Sheriff, and one of the Coroners are  
kindred to the Plaintiff or Defendant, or up-  
on any other suggestion which contains a  
principal challenge, the *Venire facias* may be  
directed to the other Coroners. Dyer 367.

Error of a Judgment in Northampton, be-  
cause in Northampton the Court being held  
before the Mayor and two Bayliffs, the *Venire*  
*facias* upon the Issue was awarded to the  
two Bayliffs to return a Jury, before the  
Mayor and Bayliffs, secundum consuetudinem  
which being returned and Judgment given,  
the Error assigned was, because the Bayliffs  
being Judges of the Court, could not also be  
Officers to whom Process should be directed,  
there being no custom that can maintain any  
to be both Officer and Judge. But all the  
Court (absente Hyde) conceived it might be  
good by custom, and that it is not any Error,  
for the Judges be not the Bayliffs only, but  
the Mayor and Bayliffs; and it is a common  
course in many of the ancient Corporations,  
where the Bayliffs are Judges, or the Mayor  
and

and they be Judges; yet in respect of executing Process, they be Officers also; and one may be Judge and Officer diversis respectibus, as in Redisseisin, the Sheriff is Judge and Officer: Whereupon Judgment was affirmed. Cro. 1. part. 138.

In Trespasse and Assault laid in the Court, to be at the Palace of Westminster; It was adjudged, that the Venire facias shall issue at Garden del Palace, and not to the Sheriff of Middlesex. Bro. tit. Ven. fac. 31.

*Venire facias*  
to the Garden  
of the Palace  
of Westminster.  
Rolls 11. Try-  
al 667.

In Trespasse against two, if one plead, and two issues are joyned upon his Plea, and two other issues are also joyned, and the Court award a Venire ad triandum exitum illum quam prædictum alium exitum inter the Plaintiff and the other Defendant, &c. This is a good award, although there be several issues betwixt the Plaintiff and both Defendants, because that this word Exitus may be for all reddendo singula singulis, Hob. 91.

Award of  
*Venire facias*.

If an Inquest remain for default of Rapers, and a Decem Tales is awarded, and the Defendant saith for his deliverance that he is Lord of the Rape, where, &c. and that all there are within his Distress, and pays a Writ to the next Hundred; the Court may try this by Tryors presently, without a return of the Sheriff, and if it be true may award to the next Hundred, otherwise if it be false, 3 H. 6. 39.

*Prochein Hun-*  
dred.

## C A P. IV.

What faults in the *Venire facias* shall vitiate the Tryal, what not. When a *Venire facias de novo*, shall be awarded; when several *Venire facias*'s. When the *Venire facias* shall be betwixt the Party and a Stranger to the Issue; Who may have a *Venire facias* by *Proviso*, and when.

*Venire facias*,  
why the  
Writ so cal-  
led.

Statute of  
Jeofailes 21  
Jac. 13.

**W**E have now shewed you to what Officer the *Venire facias* shall be directed; The next step in the Writ is *Præcipimus tibi quod Venire facias*: which words *Venire facias*, are the most effectual words in the Writ, and therefore they give the denomination to the whole Writ: And here opportunity is offered us to speak something of a *Venire facias* in general. I am not ignorant how our Books swarm with Cases which arise from the defects in this Process, and how that Werdings have been let aside, Judgments stayed and reverted, for want of sufficient Returns, misawarding, disagreement with the Rolls, discontinuance, and many other faults in this Writ. But the Statutes of Jeofailes (especially the Statute 21 Jac. cap. 13.) have pardoned (as I may so say) these enormities; As, The awarding this Writ, *Hab. Corpora*, or *Distringas* to a wrong

wrong Officer, upon any insufficient suggestion, or by reason the Visne is in some part mis-awarded, or sued out of more places or fewer places than it ought to be, so as some place be right named: The misnaming of any of the Jury, either in Sir-name or addition in any of the said Writs, or in any Return thereupon, so that upon examination it be proved to be the same Man that was meant to be returned; or if no Return be upon any of the said Writs, so as a Pannel of the Names of the Jurors be returned, or annexed to the said Writ; or if the Sheriff or Officers Name, having the Return thereof, is not set to the Return of any such Writ, so as upon examination it be proved that the said Writ was returned by the Sheriff or Under-Sheriff, or such other Officer. In all these Cases the Judgment shall not be stayed, nor reversed for these defects.

But this Act doth not extend to any Writ, Declaration, or Suit of Appeal of Felony, or Murder, nor to any Indictment or Presentment of Felony or Murder, or Treason; nor to any Process upon any of them; nor to any Writ, Bill, Action, or Information upon any popular or penal Statute; wherefore since Informations and popular Actions are grown so frequent, the Attorneys, &c. herein had best beware of these mistakes.

By this Statute many defects are remedied, which were not by the Statutes of 32 Popular Ass. 8. cap. 30. and 18 Eliz. cap. 14. yet all on, &c.  
are not; for this Act only helps the misnaming of a Juror in Sir-name, or addition, and saith nothing of his Christian name: where-

Christian  
name mis-  
taken in the  
*Venire facias*,  
incurable.

wherefore I conceive the Law in Codwel's Case in the fifth Report, remains as it was then; which is, that if a Juroꝝ be mis-named in his Christian name, on the *Venire*, though he be named right in the *Distringas* and *Postea*, yet this is ill, and not amendable, and with this agrees Goddard's Case, Cro. 2. part 458.

Christian  
name right in  
the *Venire fa-  
cias*, and  
wrong in the  
*Distringas*.

And since the Court (Cro. 1 part. f. 203.) doubted thereof, I may well put the Question; If a Juroꝝ be right named upon the *Venire*, and mis-named in his Christian Name in the *Distringas*, &c. whether this is amendable or not; without dispute it is not by the Statute of 21 Jac. for that only helps the *Sir-Name*. But with reverence to the Courts doubt, I conceive clearly, it is holden by the Statutes of 32 H. 8. and 18 Eliz. as a discontinuance of Process; and I may with the more confidence believe it, because in Codwel's Case aforesaid, where in the Pannel of the *Venire*, a Juroꝝ was named Palus Cheale, and in the *Distringas*, &c. he was right named Paulus Cheale, and so because he was mis-named in his Christian Name in the *Venire*, Judgment was arrested. But it is there adjudged, that if he had been well named upon the *Venire*, and mis-named on the *Distringas* or *Postea*, then upon examination it should be amended. But the Countess of Rutlands Case, Lib. 5. 42. is express in the Point, and so is Cro. 3. part. 860. Rolls 196. Teppet in the *Venire* and Tipper in the *Distringas*, amended. And so if the mistake be in the Pannel Jurata, the Sheriff may come in Court, and amend it. And so if

If Samuel be in the Venire and Distringas, and Daniel in the Nomina Juratorum, upon examination, this may be amended. And so if the Name be right in the Venire, and mistaken in the Christian Name in the Distringas or Postea, it is amendable. Rolls 197. And so if he be De A. in the Venire and Distringas, and De B. in the Nomina Juratorum, this is amendable.

And it is to be known, that in most Cases, where the Venire facias, Habeas Corpora, or Distringas be defective, they are to be amended; but if the malady be so fatal in the Venire, that it causes a mistrial, (as in the mistake of a Jurors Christian Name, or where a Juror not returned is sworn, &c.) then the Verdict is to be set aside, and a Venire facis de novo, to be awarded; and so was it to be upon those mistakes, (now amendable by the Statutes) before the making thereof. And where a Jury giveth a Verdict which is accepted and Recorded by the Court, be the Verdict perfect or imperfect, the Jurors are discharged, and shall never try the same issue again upon a new Nisi prius. But if the Verdict be so imperfect that Judgment cannot be given upon it, then the Court shall award a Venire facias de novo, to try the issue by other Jurors. Lib. 8. 65. Bulstr. part 32.

*Venire facias de novo.*

One Jury shall not try a Cause twice.

If upon an issue all the matter be not fully enquired, a Venire facias de novo shall be awarded. 18. E. 3. 50.

*Venire facias de novo.*

In an Audita Querela, if the Parties go to issue upon payment according to the defeasance of the Statute, and this is found for the

the

the Plaintiff, but the Jury do not assess Damages, the Court shall award a Venire facias de novo, to assess Damages. 22 E. 3. 5. vide hic cap. 6. and Rolls tit. Tryal 593, 595.

If the Record of the Nisi prius be unum modum tritici for modium, and the Plaintiff is Nonsuit at the Assise, for this mistake, if the Record in Court be right, scil. Modium, this Nonsuit shall not be Recorded, but a Venire facias de novo shall be awarded. So for any other mistake, as if the Record in Court be Grays-Inn Lane, &c. and the Nisi prius, which is but a Transcript, be Graves-Inn Lane, &c. For this is a Nonsuit upon another Record than what is in Court.

In Battery against Three who plead Three several Pleas, and upon the Writ of Nisi prius, two issues are found for the Plaintiff, and Damages assessed; but nothing is found for the third issue, this is a mis-trial, and a Venire facias de novo shall issue.

Detinue.

In Detinue, if the Jury find Damages and Costs, but no value, as they ought, this shall not be supplied by a Writ of Inquiry of Damages, but a Venire facias de novo shall be granted. And so of other defects in finding the full issue.

Quare impedit.

In a Quare impedit if the issue be found for the Plaintiff, but by negligence, the Jury do not inquire of the four points, scil. de plenitudine, ex cujus presentatione, si tempus secessit, and the value of the Church per annum; This shall be supplied by a Writ

**Writ of Inquiry**, without a *Venire facias de novo*, because the Court *ex officio* ought to charge the Jury with the four points of Inquiry, and if the Jury had found them, an Attaint lay; for as to this they were but an Inquest of Office.

In a **Writ of Annuity**, if the issue be found for the Plaintiff, but the Jury do not assess Damages or Costs, this shall not be supplied by a **Writ of Inquiry**, but a *Venire facias de novo* shall be granted. Annuity.

In **Ejectment** against Baron and Feme, and the Jury find the Wife not guilty, and find a special Verdict as to the Husband, which special Verdict is afterwards adjudged insufficient by the Court, a *Venire facias de novo* shall be granted for both, as well the Wife as the Husband, and the Wife may be found guilty, because the Record and Issue are entire, and the Verdict is insufficient and void in tout. Ejectment.

So if there be several issues, and the Jury find some well and directly, and in others special Verdicts which are imperfect, a *Venire facias de novo* shall be granted for all, and the Jury may find contrary to their first finding. Imperfect Verdict.

In **Trespals of Assault and Battery**, and taking away of grain, and the Defendant to the Battery justifies in defence of his grain, upon which the Plaintiff demurs, and to the grain he pleads not guilty, which is found for the Plaintiff, and the Jury do not assess Damages for the Battery depending in Demurrer as they ought, in this Case, if the Demurrer be afterwards adjudged for the Plaintiff,

Plaintiff, yet the Damages for this cannot be afterwards supplied and taxed by a Writ of Inquiry of Damages, but a Venire facias de novo shall issue to Tryal, because all is comprised in one Original. Vide apres cap. 13. and devant cap. 2.

Who shall grant it?

In a Scire facias upon a Recognisance in Chancery, if the Parties be at issue, upon which the Record is commanded into B. R. and there it appears that the Venire facias is not well awarded, the Venire facias de novo shall be awarded in the Kings Bench and not in the Chancery. Rolls tit. Tryal 723.

*Album Breve,*  
the County  
left out in a  
*Venire facias.*

In Yelverton's Reports, f. 64. The Case is, that a Venire facias was made Vicecomes leaving out Salop, for which there was blank left in the Writ. But revera, it was returned by the Sheriff of Salop. In Arrest of Judgment, it was alledged that the Venire facias was vitious for this cause; but Gaudy said it should be amended; and by Fennell and Williams, it is as no Writ, because it is not directed to any Officer. And then it is aided by the Statute of Jeofailes; for it might rather be called a Blank than a Writ, because it was directed to no Officer. If there be no return of the Sheriff indorsed upon the Venire facias, it was held not amendable. 35 Eliz. Lib. 5. 4. Otherwise of the Distringas, if that be Album breve, and no return, if the Venire facias be right. Rolls tit. 204.

In Cases where there are several Defendants, who plead several Pleas, the Plaintiff may chuse either to have one Venire facias for all, or several, for every one of the Defendants; but (if you will be ruled by Stamford) the surest way is to have a Venire facias against every one, and then one cannot have benefit of the others challeng; neither shall the death of one abate the Venire facias against the other; (this he speaks of in Appeals) but if the Court once award a joynt Venire facias, you cannot have several Venires afterwards, though there be nothing done upon the first; except it be upon matter de puiſne Temps, as the death of one of the Defendants, &c. Lib. 8. 66. Lib. 11. 5. 6. Stamf. 155. Bro. tit. Venire facias 2. 35.

But now it is the usual course to have but one Venire facias upon several issues, though against several Defendants. Cro. 3. part. 525. Hob. 36. 64. And so usual, that the Court declared, Cro. 2. part. 550. That there never shall be several Venire facias to try several Issues in one County; for what should the Plaintiff trouble himself and the Country with several, when one Jury will do his turn; Et frustra fit per plura quod fieri potest per pauciora. But otherwise, if it be in two Counties. Cro. 3. part. 525.

After issue joyned by two Defendants, if one of them dye, and then a Venire facias is awarded betwixt the Plaintiff, and both the Defendants, and so in the Habeas Corpus and Distringas, yet this shall not vitiate

Several Venire facias.

One Venire facias in several issues. Vide Rolls tit. Tryal 596. 620. 667. Hob. 88. 51.

Venire facias between the Plaintiff and two Defendants where one is dead.

No surmise in  
Judicial  
Writs, of  
death in one  
of the Parties.

*Venire facias*  
dated before  
the Action  
brought.

Parties Names  
mistaken in a  
*Venire facias*.

Mis-tryal.

No *Venire fa-*  
*cias* holpen.

the *Venire facias*, &c. to make Error; be-  
cause, though one of the Defendants be  
dead, yet the other being alive it is sufficient.  
And there needs be no surmise in Judicial  
Writs, that one of the Defendants is  
dead; It is time enough to shew it to the  
Court at the day in bank. Cro. 1 part. 4.  
26. But if there be two Defendants, and  
the *Venire facias* be but against one of them,  
'tis Error. 7 H. 4. 13. and Bro. tit. Ven.  
fac. 11. Cro. 1 part. 426.

If the *Venire facias* bears date before the  
Action brought, or varies from the Roll,  
yet it is aided by the Statutes of Jeofails.  
Cro. 1. part. 38. 90, 91. 203, 204. Miscon-  
tinuance or discontinuance, or misconveying  
of Process is aided by 32 H. 8. 30. The  
want of any Writ Original or Judicial, defaults  
in their Form, and insufficient Returns there-  
upon, are aided by 18 Eliz. 14. Cro. 3. part.  
259. But you must have a care the *Ve-*  
*nire facias* be not faulty in any other matters  
of substance; for if the Parties Names be  
mistaken, or the issue, as if the issue be ne-  
ver unques Executor, and the *Venire facias* be in  
placito debiti, &c. this is a mis-tryal. Cro.  
2. part. 328. So it is if the *Venire facias*  
be in placito transgressionis, where the Action  
is in placito transgressionis, & ejectionis fir-  
me. This misawarding of Process is ne-  
ver aided by any of the Statutes, and better  
it were that there had been no *Venire fa-*  
*cias* at all in such a case; for then the Sta-  
tutes would have holpen it. Cro. 3. part.  
622. Stat. 18 Eliz. 14.

If a Venire facias be directed to the Coroners, all the Coroners ought to joyn in the Return, they being Ministers not Judges, and so both of the Sheriffs of London ought to joyn, or else the return is not good. Hob. 97.

Note, the principal Statutes of Jeofailes are 8 H. 6. cap. 12. and cap. 15. 32 H. 8. cap. 30. 18 Eliz. cap. 14. 21 Jac. cap. 13. and 16 and 17 Car. 2. 8. Intituled, An Act to prevent Arrests of Judgments and superseding Executions. And the three first of these Statutes do not extend to Appeals, nor to Pleas of the Crown, or to any proceedings upon them, for these are excepted; nor to the amendment of any Exigent, to make any one Outlawed. As you may see at large, Lib. 8. 162. Blackmore's Case.

Note, if the Distringas be betwixt wrong Parties, as if the Parties Names are mistaken, the Judge of Assise cannot proceed if the mistake be insisted upon; altho it should have been no Error after Verdict; held so before Justice Windham, Lent Assises, 1681. And so I have known it ruled by other Judges, and the Tryal refused. See Littleton's Reports 253.

And the four last of the said Statutes do neither extend to them nor to Actions or Informations upon Penal Laws, only in the last of them, viz. 16, 17 Car. 2. there is a limitation in the negation of the Extent, viz. Other than concerning Customs, Subsidies of Tonnage and Poundage, to which it doth extend.

If the Venire facias be directed Vicecomiti London, Salutem, &c. præcipimus tibi, and not vobis, after Verdict this is amendable. 39 Eliz. B. R. Adjudge, Rolls 200.

And so it is, if after & habeas ibi hoc breve, & Nomina Juratorum be left out, ibid. and 204.

But if the date of the Teste be after the Return, this was held not amendable, 32, 33 Eliz. B. R. ib. sed vide hic ante. But if the Award of the Venire facias upon the Roll be right, and the Writ wrong, it may be amended by the Roll, as the mispision of the Clerk. ibid. 201.

If the words, quorum quilibet habeat be left out, or duodecim, or qui nulla affinitate attingunt, or Vicecomiti be left out, these are amendable as mistakes of the Clerk. Rolls 204, 205.

*Venire facias*  
between a  
Parry and a  
Stranger.

In some Cases a Venire facias shall be awarded to make an Enquest betwixt a Stranger to the Writ and Issue, and the Party. I will instance but in one, and that is upon the Statute of Westm. 2 cap. 6. If a Tenant being impleaded vouch to Warranty, and the Vouchee denieth the Deed, or other cause of the Warranty, &c. that the Demandant may not hereby be delayed, he may sue out a Venire facias to try the Issue between the Tenant and Vouchee.

Inquest at  
whose re-  
quest.

Inquests in Pleas of Land, shall be as well taken at the request of the Tenant, as of the Demandant. 2 Edw. 3. cap. 16. If the Plaintiff or Demandant, desisteth in prosecuting his Action, and bringeth it not

not to Tryal, then the Defendant or Tenant may sue forth a Venire facias with a Proviso, which is to no other end but that the Sheriff should summon but one Jury, if the Plaintiff also should have brought him another Writ, to the same purpose; and although (as my Lord Dyer saith, fol. 215.) the granting of this Venire facias, &c. with a Proviso, depends much upon the discretion of the Court, yet for the greater part it is not grantable for the Defendant, unless when he is actor as well as the Plaintiff, or unless there be a default, and Laches in the Plaintiff; therefore there can be no Tryal by Proviso against the King (unless with the Attorney General's consent) because no default or Laches can be imputed to the King. But an abowant in Replevin, may have a Venire facias with a Proviso, immediately after issue joyned, because he is actor, and in nature of the Plaintiff.

*Venire facias*  
by Proviso.

If the Plaintiff in Detinue and the Garnishee be at issue, and the Plaintiff prays a Nisi prius, and this is granted, yet the Garnishee at the same time may have a Nisi prius with Proviso, because he is Plaintiff also.

Proof pre-  
sently after  
issue joyned.

Garnishee.

19. Lib. 6. 46. Rolls Tit. Tryal 629.

If the Plaintiff deliver the Writ to the Sheriff tarde, so late that he cannot serve it, the Defendant shall have a Writ with a Proviso.

Tardus

But at the same time the Plaintiff may have another Writ, and the Sheriff may return which of them he pleases at his Election. 8 H. 6. 6.

The Provifo ought to be, quando duo brevibus sunt in eodem gradu & qualitate.

If the default be in the Plaintiff after issue in the prosecuting of the Venire facias, then the Defendant may have a Venire facias with Provifo, but not a Habeas Corpus with a Provifo, until the Plaintiff have made a default in the same Writ, for he ought only to have the same Process with a Provifo, in which there was a default of the Plaintiff first: and therefore although the Defendant had a Venire facias with a Provifo upon a default of the Plaintiff, yet he cannot have a Nisi prius by Provifo, without another default of the Plaintiff.

If the Defendant had a Habeas Corpus by Provifo, and the Jury remain for want of Hundredors, yet he cannot have a Distringas Jur. with a 10. Tales cum Provifo, until a default of this request of a Tales is in the Plaintiff. D. 15 El. 318. 10.

How the  
Plaintiff may  
stop the De-  
fendants Pro-  
vifo.

But note the Nota (in Stamford's Pleas del Coron. f. 155.) That if by negligence of the Plaintiff, the Defendant sues a Venire facias with a Provifo, yet the Plaintiff may at his pleasure stay the Defendant, that he shall not proceed in his Process, in praying a Tales upon the Defendants Process, as it appears T. 15 H. 7. f. 9. And the Defendant shall never be received to pursue this Process with a Provifo, so long as the Plaintiff pursues, or is ready to pursue, as appears Mich. 14 H. 7. f. 7.

Tales Men.

And seeing the Tales Men offer themselves to us, we will tell them upon what account they come, before they thrust themselves in.

to the Inquest, commonly for the love of  
right Pence; but it may be to do some of  
their Neighbourz a shrewd turn.

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C A P. V.

Why the *Venire facias* runs to have  
the Jury appear at *Westminster*,  
though the Tryall be in the Coun-  
try. Of the Writ of *Nisi prius*, when  
first given, when grantable, when  
not, and in what Writs. Of Ju-  
stices of *Nisi prius*. Of the *Tales*  
at Common Law and by Statute.  
When the Transcript of the Record  
of the *Nisi prius* differs from the  
Roll, whereby the Plaintiff is Non-  
suited, he may have a *Distringas*  
*de novo*.

**B**UT to observe the method of the  
Writ, the next words are, *Coram*  
*iudicariis nostris de Banco apud Westminst.*  
*li die.* And here first of all you may ask  
me, to what purpose the Sheriff is com-  
manded to cause the Jury to come to West-  
minster, when they are to try the Cause in  
the Country, and in truth are not to come  
to Westminster? I must confess the resolu-  
tion of this Question is not unnecessary:

Why the *Venire facias* is to have the Jury appear at *Westminster*.

Hab. Corp.

Distringas.

Tryals at Bar.

Where a Jury is not compellable to appear at *Westminster*.

wherefore we must know, That Original-ly, before the Writ of *Nisi prius* was given, the purpose for which the twelve Men were to be summoned upon the Writ of *Venire facias* to come to Westminster, was that contained in the Writ, videl. *Ad faciend. quendam Juratam*; for then was the Tryal intended to be there, if a full Jury appeared; if not, then a Habeas Corpora, (with a Tales sometimes annexed to it, the form whereof you may see in the Register,) and if they did not appear at the Return in the Habeas Corpora, then went out the Distringas. This I speak of the Common Pleas: But the course of the Kings-Bench and Exchequer, is, after the *Venire facias*, to have Distringas, leaving out the Habeas Corpora. Tryals then were all at the Bar. (I speak not of Assises.) But now, because Jurors did not use to appear upon the *Venire facias*, it being without Penalty; Tryals at the Bar are appointed upon the Habeas Corpora, and Distringas, because the Jury will more certainly appear at the day in the Distringas through fear of forfeiting issues; which the Sheriff returns on the Distringas, not on the *Venire facias*. By the Statute of 18 Ed. cap. 5. no Jury shall be compelled to appear at Westminster, for the Tryal of an offence upon (any penal Law) committed above thirty Miles from Westminster, except the Attorney General can shew reasonable cause for a Tryal at Bar.

Thus it was at Common Law, before the giving of the Writ of *Nisi prius*, when all Jurors, together with the Parties came up

to the Kings higher Courts of Justice, where the Cause depended; which (when Suits multiplied) was to the intollerable burthen of the Country, 27 E. 1. cap. 4.

Wherefore by the Statute of Westminster, *Nisi prius*, when first given, and wherefore.

cap. 30. A Writ of *Nisi prius* was first given; and that in the *Venire facias*, as we may see in the form of the Writ there mentioned, scil. *Præcipimus tibi quod venire facias* coram Justiciariis nostris apud Westmon. in festis Sancti Michaelis, nisi talis tali die & loco ad partes illas venerint 12. &c. By

which Writ it appears that the *Venire facias* was not returnable till after the day of the *Nisi prius*. But the mischief thereof was so great, partly in respect that the Parties not knowing the Jurors Names, could not tell how to make their Challenges, and so were surpris'd; and partly in respect of the Jury, who were greatly delayed by the Excuses of the Parties, that by the Statute of 2 E. 3. cap. 11. It is Ordained, That no Inquest, but Assises and deliverances of Goals, be taken by Writ of *Nisi prius*, nor in other manner, at the Suit of the great or small, before that the Names of all them that shall pass in the Inquests be returned in the Court. And

their names must be returned upon a Panel annexed to the *Venire facias*, so that either Party may have a Copy of the Jury, that he may know whom to challenge; and the Jury not coming upon the *Venire facias*, make feigned default, which warrants the *Dirigas*, &c. unless they appear at the day of *Nisi prius*.

*Stamfords*  
Pleas of the  
Crown. 156.

*Nisi prius* in  
the *Venire*  
*facias*.

The Names of  
the Jurors  
must be re-  
turned into  
the Court be-  
fore any Try-  
al, and why.

It is in the Courts discretion, whether to grant a *Nisi prius* or not.

When the Court cannot grant a *Nisi prius*.

Where the King is concerned.

So that by what hath been said, you may perceive to what purpose the Sheriff is commanded to cause the twelve Men to come to Westminster, though the Tryal be in the Country. And that, ad faciend. quendam Juratam, because it is in the discretion of the Court, whether to grant a Writ of *Nisi prius*, or to have a Tryal at the Bar. And for this, the Duke of Exeter being Plaintiff in Trespass, a *Nisi prius* was prayed for the Duke, and it was denied, for that the Duke was of great power in that County. And if the Tryal should be had in the Country, inconvenience might thereupon follow, as you may read, 2 Inst. 424. and 4 Inst. 161. Nay in some Cases (as if the Cause require long examination, &c.) it is not in the power of the Court to grant a *Nisi prius*, if the King please: for in such Cases, as appears by the Writ in the Register, 186. the King by his Writ may restrain, and command the Justices that they shall not award any Writ of *Nisi prius*, and if they have that they supersede it. F. N. B. 240, 241. No *Nisi prius* shall be granted where the King is party, without especial Warrant from the King, or the Attorney General's consent. Stamf. 156. F. N. B. 241. 4 Inst. 161.

In a *Præcipe quod reddat*, if the Tenant after aid of the King, pleads to the Inquest, the Plaintiff shall not have a *Nisi prius*, because the Tenant hath aid of the King, and so the King is in a manner Party. 25 E. 3. 39. Neither is a *Nisi prius* to be granted, if any of the Parties may have prejudice by it.

If the Justices de Nisi prius dye before the day in Bank, yet the Record shall be received from the Clerk of Assise, without a Certiorari, or other form of Entry but the ancient form.

Certification  
of Verdicts.

Also in that Case a Certiorari may be directed to the Executors or Administrators of the Justices, to certify the Record, D. 4, 5 Mar. 163. 55. Rolls Tit. Tryal 629.

They have no power to increase Damages, or to allow or disallow Protections, nor to allow a Plea of Excommungement in the Plaintiff. But they may Record the Protection and the Default, and this shall be allowed or disallowed in B.

What things  
the Justices  
of Nisi prius  
may do.

They may demand the Jurozs upon a Pein, they may amerce Jurozs, and punish a Trespass done in their presence, which is in default of the King, and for this make Process, and may fine Offenders.

Jurors sur  
paine fine.

In Execution the Defendant may plead at the Assises, that the Plaintiff hath entered in parcel of the Land mentioned in the Declaration puis le darrein continuance, and the Justices of Nisi prius may accept this Plea. If it is in their Election; for if they perceive the Plea is dilatory, they may refuse for it is at their discretion. Sir Hugh Towns Case, in Scaccario. Mich. 8 Jac. Rolls Tit. Tryal 630.

Plea puis  
darrein con-  
tinuance.

If eleven Jurozs be sworn, and the twelfth challenged, and the Jurozs cannot agree on the challenge; for ten affirm the challenge, and the other denies it, although the party which did not take the challenge will not agree that the eleven sworn shall have another

The power of  
the Judge up-  
on disagree-  
ment or other  
matter.

Challenge.

another to them in lieu of him that is challenged, yet Court may do this.

If a challenge be taken to the Array before any Juror is sworn, and Tryors be chosen, who cannot agree, yet they shall not be commanded in custody, because they never were sworn upon the principal. But the Court may discharge them and chuse others.

Jurors discharged.

If there be three Tryors who will not agree, the Court cannot take the Verdict of two, and command the other to Prison. The same Law in case of a Verdict upon a issue.

Where fourteen Jurors are impannelled for the King, the Judge cannot discharge any of them after they are sworn, if it be that they will not agree with their Companions.

Amercement.

If the Jury say upon demand of the Court that they are agreed, and afterwards when they are opposed, they say the contrary in any matter, they may be amerced for this. Rolls Tit. Tryal 675.

*Nisi prius*, why so called.

And now since the *Nisi prius* (for so it is called, because the word *prius* is before venire in the *Distringas*, &c. which was not in the *Venire facias*, upon the Statute of 2. cap. 30. before rehearsed,) must not be in the *Venire facias*, because the Names of the Jurors are to be returned to the Court before the granting of the *Nisi prius*; therefore the *Nisi prius* is now in the *Habeas Corpus* and *Distringas*. And if the Sheriff return not a Pannel of the Jurors upon the *Venire facias*, there shall be no *Nisi prius* upon the Tales, until a Pannel be returned.

No *Nisi prius* before the *Venire facias* returned.

H. 6. f. 10. 1 H. 5. f. 11. which brings  
e again to speak of the Tales.

A Tales is a supply of such Men, as were The Tales at  
pannelled upon the Return of the Venire Common Law.

facias, grantable, when enough of the prin-  
cipal Pannel to make a Jury do not appear,  
if a full Jury do appear, yet if so many  
be challenged, that the residue will not  
make a Jury, then a Tales may be granted.  
And this at the Common Law was by Writtes  
Decem tales, Octo tales, &c. (out of the  
King's Courts) one of them after another,  
where was need, until there was a full  
Jury. But now by the Statutes of 35 H. 8.

4, 5. P. M. 7. 5 Eliz. 25. and 14 Eliz. 9.

The Justices of Assise, and Nisi prius, at  
the Request of Plaintiff or Demandant, De-

Tales by  
Statute.

endant or Tenant, or of the Prosecutor  
in quam, if (two, more, or but one of the  
principal Pannel appear at the day of Nisi  
prius, may presently cause a supply to be  
made of so many Men as are wanting, of  
them that are there present standing about  
the Court; and hereupon the very Act is cal-  
led a Tales de circumstantibus.

Note the difference between Tales at Com-  
mon Law, and Tales by the Statute, the  
first called only [Tales,] the second [Tales de  
circumstantibus,] the last of which cannot be  
granted at a Tryal at Bar, which is a Try-  
al at Common Law; for there it must be  
by [Tales] by Writ annexed to the Veni-  
facias. But Tales de circumstantibus is gra-  
nted by Statute to Tryals by Assise and Nisi  
prius, per Stat. 35 H. 8. 6. Yet such a Tales  
in Indictment in Wales, was out of that  
Sta-

Statute, and helped by the 4 and 5 Ph. and Mar. 7.

*Tales*, in what cases it shall granted.

If the Issue be to be tryed by two Counties, and one full Inquest appear of one County, but the Inquest remain for default of Jurors of the other County, a Tales shall be awarded to the County where the default is, not to the other.

If a Juror dye after he is Impannelled, a Tales shall issue, not a Venire facias.

What persons may have a *Tales*.

Upon a Pluries Distringas, three only appear, the Plaintiff prays another Distringas without praying a Tales, yet if the Defendant pray a Tales, the Court ought to grant it. D. 20 El. 359. 2.

In what Cases.

A Tales shall be granted in an Attaint, if all the Grand Jury make default.

At what time.

It cannot be granted at the day of the return of the Venire facias.

If the Venire facias be good, and the Habeas Corpus ill, if the Pannel be affirmed yet the Tales is void, for in effect there is only a Venire facias returned, and then a Tales.

*Tales* with a *Proviso*.

If the Defendant hath a Habeas Corpus with a Proviso, yet the Tales ought not to be granted with a Proviso, at the Defendants request, before a default in the request of a Tales in the Plaintiff.

At Common Law before the Statute, by custom of a Court a Tales de circumstantibus might be granted, for this is a good Custom Dubitatur, Rolls Tit. Tryal 672.

*Tales* denied.

If great persons are concerned, and by their labouring the Jury doth not appear, and Tales Men are prepared for their turn

and there is a great tumult de circumstantibus; the Justices of their discretion may award a Tales, and adjourn in Bank, notwithstanding the Statute. The principal Personnel must stand, or else there can be no Tales.

If the Bayliff of the Franchise answer, that there be not sufficient of his Bailiffs, the Justices may award a Tales de circumstantibus to be returned by the Sheriff.

If the Tenant for Life pray in aid of the King, who hath the reversion, the Justices cannot grant a Tales de circumstantibus, because the King is concerned.

If two Coroners or Esquiers return the Panel, one of them cannot return the Tales,

If the Defendant sue the Writ of Nisi prius by Proviso, yet the Plaintiff may have a Tales, &c.

The Sheriff may return twenty four, Attorney. or any number upon the Tales de circumstantibus. And it may be prayed by Attorney (although the Statute doth not mention an Attorney) as well as in proper person.

The Vouchee in a Præcipe quod reddidit may pray a Tales, though he be neither Plaintiff nor Demandant in the first Action.

If there be three Plaintiffs in Replevin, and one of them makes default at the Nisi prius, the other two cannot pray a Tales; otherwise of two Copartners.

Mayor and Commonalty in their proper persons cannot pray a Tales: A Bishop or Abbot may.

Two

Two Plaintiffs in Trespass, and at the Nisi prius the Defendant shews a Record to the Court, by which it appears that one of the Plaintiffs was outlawed after the last continuance, the other cannot pray a Tales.

The Sheriffs upon the Tales de circumstantibus may Impannel a Priest or Deacon, if he hath sufficient Freehold of Lay Fee, but not an Infant, nor one of the Age of eighty years.

What Persons  
of the Tales.

He may Impannel Coroners, Capital Ministers of any Corporation, Foresters, Men Blind, Mute (if they have their understanding, but not deaf Men) Excommunicated Persons, but not Outlawed or Attaint, nor Aliens, nor Clerks Attainted, nor Persons Attainted of false Verdicts.

The Coroners may put the Sheriff on the Tales.

Challenge.

It seems by the Statute, none of the parties can challenge the Array of the Tales, but only to the Poll.

After a challenge to the Poll tryed, there shall be no other challenge to the same Poll, for any cause or matter that is at the same time.

In an Action of Trespass for taking away the Plaintiffs Pony, one of the Tales was challenged, because he was a common Fosterer of Thieves, and dwelt in a suspicious place, and of ill Fame, and held a good challenge.

For Challenges, see the Title Challenge at large.

What

But since none can come after the Reporter, observe with me his Nota Lecteur in his 10th Report 104. That at Common Law, in the granting of a Tale five things are to be considered.

1. The time of the granting, &c. thereof.
2. The number of the Tales.
3. The order of them.
4. The manner of Tryal, that is, where by them with others, and where by them only.
5. The quality of them is to be considered.

1. That the time of granting them is upon default of so many of the principal Panel, that there cannot be a full Inquest.

who was challenged, but before he was set aside the *Tales*, by *Montague* Chief Baron.

2. That at the time of granting them, the principal Array stand; for Tales are words similitudinary, and have reference to the Assesment, which then ought to be in esse; and therefore if the Array be quashed, or all the Writs challenged and treited, no Tales shall be awarded, for then there are not Quales, but in such a Case, a new Venire facias shall be awarded. But if at the time of granting the Tales, the principal Pannel stand,

stand, and afterwards is quashed, as aforesaid, yet the Tales shall stand; for it sufficeth if there were Quales at the time of granting the Tales.

3. It is to be observed, That he which is merely Defendant, cannot pray a Tales till the Plaintiff hath made default.

4. In some Cases a Tales shall be granted after a full Jury appear and is sworn; as if a Jury be charged, and afterwards before a Verdict given in Court, one of them dye, a Tales shall be awarded, and no new Venire facias: and so if any of the Jurors Impannelled dye before they appear, and this appears by the Sheriffs return, the Pannel shall not abate, but if there be need, a Tales shall be awarded. And the time for Challenge and Tryal of the Tales, is after the principal Pannel be tryed; and if the principal Pannel be affirmed, the same Tryors shall try the Tales; but if it be quashed, then the two Tryors of the principal shall not try the Tales.

As to the second, to wit the number, two things are to be observed,

1. That in all Cases, the Tales ought to be under the number of the principal in the Venire facias (unless in Appeals) as in Attaint under twenty four, and in other Actions where the Venire facias is of twelve under twelve. And the reason wherefore more than the number may be granted in Appeals of the Plaintiffs part, is because the Defendant may challenge peremptorily; and if default be in the Plaintiff, then the Defendant may pray a Tales, and the Reason is in favorem vite;

vice, and that he may expedite and free himself from vexation, and the question of his life, for fear that his Witnesses should dye.

2. That the number ought always to be certain, as ten, eight, six or four, &c. But now by the Statute of 35 H. 8. a Tales de circumstantibus may be granted, as well of an uncertain as a certain number, and that by force of these words in the Statute 35 H. 8. So many, &c. as shall make a full Jury.

As to the third, to wit, the Order, It is so be known, That always in every new Tales, the number shall be diminished, as if the first be ten, the second shall be eight, and always less. But if the Tales awarded be washed by challenge, you may have another of the same number.

As to the fourth, to wit, the manner of Tryal, that is commonly by them with others; but by them only, when after the granting the Tales, the principal Warrant is washed, then the Tryal shall be only by the Tales, or if the Tales do not amount to a full inquest, another Tales to supply the former may be granted.

As to the fifth, to wit, the Quality of the Tales, they ought to be of the same Quality as the Quales are; and therefore if the first be per medietatem linguæ, of English and Welsh, so ought the Tales to be; so if the principal be out of a Franchise; so if the Venire facias be directed to the Coroners, so ought the Tales; and all things which are required by Law in the Quales are required in the Tales, as you may read in the afore-

Therefore if the Venire facias be not de medietat. lingue, the Tales cannot.

3 E 4. 12.

said Statutes. Vide Stamf. Ples del Corone, f. 155.

Where a Juroz is withdrawn, when the Plaintiff intends to bring the Cause to Tryal again, he may have a Distringas, &c. with a Decem Tales.

Attaint:

By the Statute of 23 H. 8. cap. 3. If there be not enough sufficient Freeholders as are required in an Attaint, in the County where such Attaint is taken, a Tales may be awarded into the Shire next adjoyning.

*Nisi prius*  
amendable.

If the Transcript of the Record of the *Nisi prius* be mistaken, and not warranted by the Rolls, for which cause the Plaintiff becomes Non-suit, he may have a Distringas de novo, upon motion to the Court, and the Postea shall not be recorded, Cro. 1. part 20. Palmers Reports 378. For there is but one Transcript of the Record sent to the Justices of *Nisi prius*. First they were Justices of Assise, and therefore they retain that name still, though Assises are very rarely brought for this common Action of Ejectment but Ejectment most real Actions, and so the Assise is almost out of use.

Justices of  
*Nisi prius*, and  
Justices of  
Assise.

## C A P. VI.

Of the number of the *Jurors*, and why the Sheriff returns twenty four, though the *Venire facias* mentions but twelve: If he returns more or less, no Error, and of the number twelve. And when the Tryal shall be *per primer Jurors*. And of Inquests of Office; and when to remain *pro defectu Juratorum*.

**N**ow for the Quales; and these you see for number must be twelve, by the Common Law, Doct. and Stud. f. 14. For quality, *liberos & legales homines*. And first their number twelve: and this number is so less esteemed of by our Law than by Holy Writ. If the twelve Apostles on their twelve Thrones, must try us in our Eternal State, good reason hath the Law to appoint the number of twelve to try our Temporal. The Tribes of Israel were twelve, the Patriarchs were twelve, and Solomon's Officers were twelve, 1 Kings 4. 7. vide Sir Henry Spelman, verb. [Jurata] Therefore not only matters of Fact were tryed by twelve, but of ancient times twelve Judges were to try matters in Law, in the Exchequer Chamber, and there were twelve Councelloys of State for matters

Of the number 12.

Josh. 4.  
Genes. 49.

Plow. Com.  
in proœmlo.  
12 Judges.

Less than 12  
In Inquests of  
Office.

Finch 400,  
484.

Inquests of  
Office. *Vide*  
*hic* cap. 13.

Why the  
Sheriff re-  
turns 24.

of State; and he that wageth his Law, must have eleven others with him, which think he says true. And the Law is so precise in this number of twelve, that if the Tryal be by more or less, it is a *Mis-Tryal*; but in Inquests of Office, as a *Writ of Mandamus* there less than twelve may serve. *F. N. B. 107. c.* And in *Writs* to enquire of Damages, the just number of twelve is not requisite, for they may be over or under; and so it was resolved *Trin. 1651. B. R. Abbot v. Holt*, that the Sheriff ought (in *Writs* of Inquiry) to summon twelve by their Names, yet Damages assessed by a less number is sufficient, and in the *Writ* to the Sheriff, *quod ipse inquiret per Sacramentum proborum hominum*, omitting [*duodecim*] its good and usual.

And in a *Writ* of Inquiry of Waste by thirteen, it was holden good. *1 Cro. 414.*

In Dower if the Tenant come at the Grand Cape, and say he was always ready to render Dower, and issue is taken upon this, although seisin of the Land be presently awarded, yet no Inquest of Office, but the Jury upon the Tryal of the Issue shall assess Damages. *22 E. 3. 15.*

In what Cases there shall be an Inquest of Office, and in what not, see *Rolls tit. Tryal* 595.

And although there can be no *Verdict* by twelve, yet by ancient course and usage, (which as the Lord Cook tells you, makes the Law in this Case, *1 Inst. 155.*) the Sheriff is to return twenty four. And this is for expedition of Justice; for if twelve should only

only be returned, no Man should have a full Jury appear or sworn, in respect of Challenges, without a Tales, which should be a great delay of Tryals; and for this cause at Common Law, 'twas Error if the Sheriff returned less than twenty four. But now it is remedied by the Statute of 18 Eliz. as a misreturn, see Cro. 1 Part. 223. Lib. 5. 36, 37. By which Books it appears, that if the Sheriff return but twenty three, &c. it shall not vitiate the Verdict of twelve, no, though a full Jury do not appear, so that the Tryal is by ten of the principal Pannel, and two of the Tales, notwithstanding Maynards Opinion to the contrary, and Cro. 3 part 587. The Sheriffs used to summon above twenty four, scil. effrænata[m] multitudinem, but now they are prohibited by Statute to summon above twenty four. Westm. 2. cap. 38.

If the Sheriff return less than 24 it is no Error.

Keeble 1 part 310.

Must not return above 24.

If the Issue be to be tryed by two Counties, if but one of one County appear, although a full Inquest appear of the other, yet this shall remain for default, because they cannot try that which is in another County. There ought to be six of each County. And two of one Inquest out of a Franchise, and another out of the Guildable, and so of two Pannels returned in an Assise by several Bayliffs of Franchises to try one issue, and one Pannel makes default, the issue shall not be tryed by the other Pannel, for the Jurors in one Franchise cannot make the view in another Franchise, Roll. tit. Tryal 673.

In What cases the Inquest shall remain for default of Jurors.

Two Counties.

The manner  
of swearing  
the Jurors.

If the Jury be of two Counties, or two Pannels of the Guildable and Franchise, &c. they shall be swozn interchangably first, one of one, then another of the other.

If the Jury go at large until another day after they are swozn, and the Roll of the entry be not in Court, they may be swozn anew. Roll tit. Tryal 674.

Where there  
must be 16.  
and 24. in a  
Jury.

To make a Jury in a Writ of Right, which is called the Grand Assise, there must be sixteen, scil. four Knights, and twelve others; the Jury in Attaint, called the Grand Jury, must be twenty four. Finch 412. and 485. But if the issue be upon a matter out of the point of the Attaint, as upon a Plea of non tenure, the Tryal shall be by twelve Juratores. 21 E. 3 10.

There may be more than sixteen in a Writ of Right. Rolls tit. Tryal 674.

Where Wit-  
nesses joyn  
with the  
Jury, the  
number is  
uncertain.

When Process used to be made out against the Witnesses in Carta nominat. to joyn with the Jury in Tryal of the Deed, as was used before the Statute of 12 E. 3. c. 2. [his Testibus] being then part of the Deed, then the number was uncertain, according as the number of Witnesses were in the Deed: wherefore no Attaint lay, if the Deed were affirmed, because more than twelve joyned in the Verdict. But otherwise if the Deed was not found, because Witnesses cannot prove a Negative. F. N. B. 106. h. 1 Inst. 6. 2 Inst. 130. &c.

Cannot prove  
a Negative.

Juror departs  
and another  
sworn by con-  
sent.

If twelve are swozn, and one of them depart by consent, another of the Pannel may be swozn, and joyn with the other eleven in the Verdict. 11 H. 6. 13.

In Error upon a Judgment in Cornwall, A Jury of six, because the Tryal was but by six, adjudged that it was erroneous, though it was returned secundum consuetudinem ibidem ante, &c. for such customs are against Law, unless in Wales, which are permitted by Act of Parliament. Cro. 1 part. 259.

If the Recoꝝd be pleaded in Bar of the Assise, and the Party that pleads says, the same Tenements were put in view to the former Jurors : If the Plaintiff saith nient comprise, this shall be tryed per primer Jurors & auters. 13 H. 4. 10. Per primer Jurors. See hic cap. 4.

So if the Tenant saith that these Lands are not the same Lands befoze recovered, this shall be tryed per primer Jurors & auters. 22 Assise 16. and so in a Redisseisin.

So in an Assise, if the Defendant plead Recovery per view de Jurors in another Assise, this shall not be tryed by the Assise, but per primer Jurors. 13 H. 4. 10.

And if at the return of the former Jurors and others, all the former Jurors appear, the Tryal shall be by them only ; but if any do not appear, they shall be supplied by the others. 40 Assise 4.

In such cases where the Plaintiff is not to recover the Land, nor to defeat the former Judgment, if nient comprise be pleaded upon Recovery pleaded, this may be tryed by other than the former Jurors. 1 H. 6. 5.

As in Trespals for Trees cut, the Defendant pleads that he recovered befoze in an Assise the same Land where, &c. and cut, &c. the Plaintiff says this Land, where, &c. was not put in view, and so nient comprise.

This

This shall not be tryed by the first Jurors, but by others, because this Action doth not defeat the former Judgment, nor recover any thing but Damages. Note the difference 1 H. 6. 5. Where the Tryal shall be per primer Jurors, and where by them and auters, and where only per auters, see Rolls tit. Tryal 593.

Certificate of  
Assise, what.

This is where a Bayliff of a Tenant in an Assise pleadeth, &c. and loseth by the Assise, and the Tenant himself hath a Release or some other discharge to plead, then he may by this means have the Parties and first Jurors to appear again, and if it be found, he that before recovered shall lose the Land, and yield double damages. Terms of Law.

## C A P. VII.

Who may be Jurors, who not ; who exempted, and of their Quality and Sufficiency.

Jurors must be  
*Liberi.*  
*Wile 2 Inst.*  
*f. 27.*

**S**O much for their Number, next their Quality is to be considered ; and for this the Writ informs you who they ought to be, 1 Liberos, that is, Freemen, not Willains or Aliens ; and that not only Freemen and not Bond ; but also those that have such freedom of mind that they stand indifferent, without any Obligation of Affinity, Interest, or any other Relation whatsoever

Soever, to either Party; sometimes the word Probos instead of Liberos is attributed to them; they are both good Epithetes for a Juror, but I esteem the first as most significant.

Fortescue  
cap. 25.

Error of a Judgment in the Marshalsea, the Venire facias being Probos & Legales, not saying as the Register is, Liberos homines, &c. sed non allocatur, but Judgment affirmed, Keeble 1 part, 563.

Saunders  
against Leek.

2. They ought to be Legales, not outlawed, nor such as have lost Liberam Legem, or become infamous, as Recreants, persons attainted of Felony, false Verdict, Conspiracy, Perjury, Praemunire or Forgery upon the Statute of 5 Eliz. cap. 14. and not upon the Statute of 1 H. 5. 3. Not such as have had Judgment to lose their Cars, stand on the Pillory or Tumbrel, or have been stigmatized or branded, nor Infidels, neither can any such be Witnesses. 1. Inst. 6.

Legales.

3. Homines; they ought to be Men (yet there shall be a Jury of Women to try if a Woman be Enseint, upon the Writ de ventre inspiciendo.) But what kind of Men these ought to be, is worthy to be known. And for this some Men are exempted from serving in Juries, in respect of their Dignity, as Barons, and all above them in Degree. Many are exempted by the Writ de non ponendis in Assisis, F. N. B. 166. as aged persons seventy years old, and many others are exempted, as Clerks, Tenants in ancient Demesne, Ministers of the Forest (out of the Forest) Coroners, Infants under the age of fourteen years, Officers of

A Jury of  
Women.

Exemption of  
Juries.

Who are to  
be exempted  
from Juries.

of the Sheriff, sick decrepit Men, and such as are exempted by the Kings Charter: yet in a Grand Assise, Preambulation, Attaint, and some other special Cases, such Men are not exempted by reason of their Dignity shall be forced to serve notwithstanding their Exemption in other Cases. See Daltons Office of Sheriffs, f. 121. 52 H. 3. cap. 14. 2 Inst. 127, 130, 378, 447, and 561. Counsellors, Attornies, Clerks, and other Ministers of the Kings Courts are not to serve on Juries; but I find one Jury made of Attornies of the Common Bench and Exchequer, in a Case brought upon a Bill in the Exchequer, by Sir Thomas Seton, Justice, against Luce C. for calling him Traytor in the presence of the Treasurer and Barons of the Exchequer. And this Jury of Attornies gave the Justice one hundred Marks Damages. 30 Assise 19.

A Jury of Attornies.

The Court frequently order a Jury of Merchants to try Merchants Affairs.

In what cases they shall be discharged by Charter.

If the Charter of exemption be, that he shall not be put in Juratis Assisis seu recognitionibus aliquibus, yet this shall not excuse in a Writ of Right upon Tryal of the Grand Assise, for he comes not in in this Case by such Process as in other Cases, but is chosen by the Oath of the four Chivaliers, and now he is in a manner Judge in this Case. 39 E. 3. 15.

Neither shall it exempt him in an Attaint, nor in a Grand Inquest, to inquire of Felonies, &c. because the Charter hath not this Clause, Licet tangat nos & hæredes nostros. 42 Ass. 5.

At the Nisi Prius the Wayliffs of a Will may shew a Charter, that to try Contracts, &c. within the Will the Inquest shall be all of Denizens without Foreigners, and this shall be allowed, and the Foreigners shall be ousted. 29 Ass. 15.

At what time and how the Charrer shall be allowed.

So may the Wurgesses, who are put upon a Jury out of the Borough, if they have such a Charter. 30 Ass. 1.

If a Man be Impannelled of an Inquest and shew such Charter of Exemption of the same King in whose time he shews it, this ought to be allowed without Writ. 39 E. 3. 15. Rolls ib. 633.

Allowed without Writ.

The King may grant one or two to be discharged of Juries, but not the whole County, for by this means there would be a failure of Justice; but the Grant shall not exempt any from serving in the Kings Bench, without express Words.

The Jurors ought to come in person and claim privilege, the Sheriff cannot return it.

4. De vicinet. de C. It is not sufficient that they dwell in the County, but they are to be of the neighbourhood, nay le plus procheins to the place of the Fact, as by Artic. super. cap. 9. it is appointed: they must be most near, most sufficient, and least suspicious, ib. as I shall shew hereafter.

Visue.

5. Quorum quilibet habeat quatuor libras terræ, tenement. vel reddit. per annum ad minus; This is their sufficiency, where the Debt or Damages (or both together, 1 Inst. 272.) amount to forty Marks or above. The sufficiency of Jurors in other Cases of lesser moment

Sufficiency of Jurors.

moment, is still left to the discretion of the Justices, Fortescue, cap. 25. who (experience tells us) never require Jurors under 40 per annum, according to the Statute of 27 Eliz. cap. 6. before which Men of 40 s. per annum served; but neither this nor the Statute of 35 H. 8. extend to Juries in Cities, Towns Corporate, or other privileged places, or in the twelve Shires of Wales, so that there they shall be returned, as before they lawfully might have been; for the Jurors sufficiency in Attaints, see the Statutes 15 H. 6. 5. 18 H. 6. 2. and 13 H. 8. 3.

As to the Statute 35 H. 8. 6. The trial ordained by that Statute, lyes only in such Actions, which have their ordinary trial by twelve Men, and not more, and by Writ of Nisi prius, and this only in those Actions in which the Process of Venire facias, Habeas Corpora and Distringas lyes against the Jurors, and in no other Actions.

And although the Statute only mention the Trial of issues joyned in the Kings Courts, commonly holden at Westminster, and if the Action be commenced in any other Court, yet if the Issue be joyned in any of the Courts at Westminster, it shall be tried according to the said Statute; and so if those Courts are removed from Westminster, the issues joyned in them shall be tried as the said Statute directs.

And the Words betwixt Party and Party, shall only be intended of common Persons, and not betwixt the King and any other person, nor when the King joyns with any other

any Person, in any Action which by his Release or Pardon may be discharged before the Action brought.

In an Information of Intrusion by the Queen, a Juror was Challenged for insufficiency of Freehold, he had but to the Value of 15 s. a Year. It was adjudged that the Statutes H. 5. 27 Eliz. &c. extend only to wirt Party and Party, and not to the Queen, and if he had any Freehold, it was sufficient, but some Freehold he must have. Co. Eliz. 38, 413. Sir Christopher Blunts Case.

Which is necessary to be known, in respect of Tales de circumstantibus, &c. See Williams his Readings upon this Statute lately come out in Print; in which there are many ingenious speculations, but because they do not come often in Practice, the project of this Treatise is only to contain Matters useful for Practisers; that the Book may not swell too big, I omit them, referring you to the Reading it self. See afterwards in the Chapter of Challenges.

It is the general course of the World to esteem Men according to their Estates; Quantum quisque sua nummorum servat in arca Tantum habet & fidei: And sure the makers of this Law had cause enough to do so in this Case; for if Men of less Estates should serve in Juries, such Juries would only be shifted into Inquests as had more need to be relieved by the Judge than discretion to sift out the truth of the Fact: 'Tis hard to get an unbiassed Jury

Jurors of  
above 4 l.  
per annum.

Jury now; but surely less Rewards would  
sooner bribe and byass meaner Men than  
these. Therefore lest poverty or necessity  
should tempt, every Juror must have 4 l. per  
annum, as aforesaid, of Freehold out of  
Ancient Demesne. And the Court may in  
matters of great consequence, direct a  
nine facias for a Jury above 4 l. per annum  
a-piece, but not under. Cro. 2. part. 67.  
But in such Cases (every one knows) the  
Court commonly orders the Prothonotary to  
choose forty eight, out of the Sheriffs Writ  
of Free-holders, of the most substantial  
in the County, and the Parties strike  
twelve a-piece, then the Sheriff returns the  
rest.

Jurors of 20 l.  
per annum.

Note, in former times when Estates of  
Inheritance were in few Mens Hands, such  
as had 40 s. per annum, were found sufficient  
Men to serve on Juries. After Estates of In-  
heritance coming in greater measure to the  
Vulgar, it was by the said Statute 27 Ed.  
cap. 6. made 4 l. per annum, and the same  
reason improving in late times, it was  
thought consistent with the wisdom of a Par-  
liament to raise it to 20 l. per annum, to the  
end Mens Estates might be trusted in the  
judgment of more knowing Judges of fact  
when they become litigious, and this was  
an Act of 16 & 17 Car. 2. cap. 3. which being  
but a probationer, and to continue but for  
three years, and from thence to the end of  
the next Session of Parliament, it is ex-  
pired; but for that it may be revived, as I hum-  
bly judge it expedient, I have thought fit to  
hint thus much concerning it.

Such a Man who hath Land, Rent, Office or other profit Apprendre, out of Ancient Demesne, to the cleer yearly value of 4 l. of which he may have an Assise, he hath sufficient Freehold to be a Juror. Vide the said Reading. Where you may know what Estate is sufficient to make a Man a Juror. See hic in the Chapter of Challenges.

But now by the Statute 4 and 5 Will. and Mariae, all Jurors (other than Strangere per Medietat. linguæ) returned upon tryal of issues joined in the Kings Bench, Common-Pleas or Exchequer, or before Justices of Assise or Nisi prius, Oyer and Terminer, Goal delivery, or general Quarter Sessions of the Peace, shall have in their own name or in trust within the same County 10 l. a Year, or more Revenues, of Freehold, or Copyhold Land, or in Ancient Demesne, or in Rents Fee-simple, Fee-tail, or for their own or some other persons Life, and in Wales 6 l. a Year. If any be returned of lesser Estate, he may be discharged by Challenge, or upon his own Oath; nor shall a Jurors Issues be labeled but by order of Court, for reasonable cause proved upon Oath.

The Sheriff, Coroner, or other Minister returning any person of lesser Estate, shall forfeit 5 l. to their Majesties, for every person so returned.

They must be summoned six days before the day of their appearance, and none to take Reward to excuse a Jurors appearance, on pain to forfeit 10 l. to their Majesties.

This Act extends not to Cities, Boroughs and Towns Corporate.

Tales Men in England shall have 5 l. a Year, in Wales 3 l. a Year.

No Fee or Reward shall be taken by any persons whatsoever, upon the account of any Tales returned, upon pain of 10 l. The one Moiety to the Prosecutor, the other to their Majesties.

No Writ de non ponendis in Affisis & Juratis shall be granted, unless upon Oath that the Suggestions are true.

This Act to be in force for three Years, from the first of May, 1693.

Jurors must  
not be of affi-  
nity to the  
party.

Et qui nec D. E. nec F. G. aliqua affinitate attingunt, the Law is very cautelous, in not leading men into temptation: Therefore, lest Kindred and Affinity should wrong the Conscience to help a Friend, our Jurors must not be related to any of the Parties; and for this reason likewise the Statutes provide that no Man of Law shall ride Judge of Assise or Goal-delivery in his own Country, R. 2. 2. 33 H. 8. cap. 24. Yet the contrary hereof is often done by a non obstante; but how consistent with integrity or prudence, they know best who procure it to be done. But because most things concerning the quality and sufficiency of Jurors, will come more properly under the Title Challenge, I will refer you thither; and first, observe more particularly, De quo vicinet. the Jury ought to come.

## C A P. VIII.

Concerning the *Visne*, from what place the *Jury* shall come, &c.

**V**icinetum is derived of this Word *Vici-Visne.*  
nus, and signifieth Neighbor-hood, or a place near at hand, or a Neighbor place, where the Question about the Fact is moved. And the most general Rule (saith Coke, 1 Inst. 125.) is, That every Tryal shall be out of that Town, Parish or Hamlet, or place known out of the Town, &c. within the Record, within which the matter of Fact issuable is alledged, which is most certain and nearest thereunto, the Inhabitants whereof may have the better and more certain knowledge of the Fact.

And if a thing be alledged in D. the Venue must not be of D. but de vicineto de D. for otherwise the Neighbor-hood would be excluded. Rolls tit. Tryal 622.

And if the Fact be alledged in quadam platea vocat. Kingstreet in parochia sanctæ Margaretæ in Civitate Westm. in Com. Midd. In this Case the *Visne* cannot come out of Parish.  
Place, because it is neither Town, Parish, Hamlet, nor place out of the Neighbor-hood, whereof a Jury may come by Law; but in this Case it shall not come out of Westminster but out of the Parish of St. Margaret, because that is the most certain. But therein also it is to be noted, that if it had been alledged

ledged in Kingstreet, in the Parish of St. Margaret in the County of Middlesex, then should it have come out of Kingstreet; for then should Kingstreet have been esteemed in Law a Town: For whensoever a place is alledged generally in Pleading (without some addition to declare the contrary, as in this Case it is) it shall be taken for a Town.

Town.

Parochia.

More 559.

And albeit Parochia generally alledged, is a place incertain, and may (as we see by experience) include divers Towns; yet if a matter be alledged in Parochia, it shall be intended in Law, that it containeth no more Towns than one, unless the Party do shew the contrary. But when a Parish is alledged within a City, there without question the Visne shall come out of the Parish, for that is more certain than the City.

If a matter be pleaded done apud Bradford in Forfeild in Parochia de Belbroughton, the Venue shall be of Belbroughton, and not of Bradford, for Belbroughton shall be intended to be a Town, and one Town shall not be intended to be in another Town, and therefore Bradford shall not be intended to be a Town. Roll tit. Tryal 619.

The Venue shall ever be of the most certain place.

In a Quo Warranto for using a Warren in D. if the Defendant say the Ville D. is parcel of the Manor of S. and prescribes to have a Warren within the said Manor and Demesnes thereof, the Venire facias shall be of the Manor, for the Manor by intendment is more large than the Vill. If the Visne be  
de

de D. and S. and the Venire facias be de D. S. and V. this is not good, because it is too large. If apud Burgum de Plimouth, the Venue may be de Plimouth generally. If apud Villam de Cambridge in Warda Fori, and the Venire facias is de Villa & Warda prædict. this is helpt by the Statute of Jeofails.

If the place be out of a Town, the Venue shall not be of the next Town, but from the place it self, but the Sheriff ought to return the Jury, de plus prochein Vill.

In Ejectment of Land in Foresta de Kewennon in Com. the Venue may be de vicineto Forestæ, for this is a place known, and by intendment, because the Defendant hath not pleaded in abatement, this is out of any Parish or Vill.

In inferior Courts within Boroughs, the Venire facias is Quod Venire facias 12. liberos Burghenses Burgi & Parochiæ de B. although there may be twelve Burghesses which are not Inhabitants, Rolls tit. Tryal 622. &c.

The Venue shall follow the Issue. Vide postea.

In Trespas and Battery in London, if the Defendant justifie in Midd. by Process out of the Marshals Court, that he Arrested him, and because the Plaintiff would not go with him, he beat him, &c. Absque hoc that he is guilty in London vel alibi, out of the Jurisdiction of the Court. To which the Plaintiff replies, and acknowledges the Arrest, but says, that he beat him at London, de injuria sua propria absque tali causa, and issue upon this, This shall be tryed in London, and the Words absque tali causa, are void,

De Corpore  
Comitatus.

Manor.

De Corpore  
Com.

the issue being joyned upon a place certain, scil. London, affirmed in a Writ of Error, Rolls ib. 624. But the Court said, that he might have demurred upon this Plea.

If a Trespass be alledged in D. and nul tiel Ville is pleaded, the Jury shall come de Corpore Comitatus. But if it be alledged in S. and D. and nul tiel Ville de D. is pleaded, the Jury shall come out de vicineto de S. for that is the more certain. So if a matter be alledged within a Manor, the Jury shall come de vicineto Manerii. But if the Manor be alledged within a Town, it shall come out of the Town, because that is most certain, for the Manor may extend into divers Towns. And all these points were resolved by all the Judges of England, upon Conference between them, in the Case of John Arundel Esq; Indicted for the Death of William Parker.

Where there may be a special Visne, the Tryal shall never be de Corpore Comitatus. Leon. 1 part. 109.

If a Venire facias ought to be of one or more Vills in certain, in a County, and this is awarded de Corpore Comitatus, This seems to be aided by the Statute of 21 Jac. of Jeofailes, for this comes from the Vill from whence it ought to come, and from others, in as much as it comes de Corpore Comitatus. Rolls tit. Tryal 618. And many other Cases concerning this matter.

But in Ejectment of Land, called S. and no place is named where the Land lyes, and a Venire is awarded de Corpore Comitatus.

is etronous, and too large, because there is a place certain where the Land lyes, and yet is not named in the Nar. as it ought to be. Hob. 121.

But if the Illus be taken upon a Title of Dignity, as whether Chivaler or not, this may come de Corpore Comitatus, because that the lieu lou, &c. is not material. lb.

If A. by the Name of A. of the County of Hampshire, bring a Scire facias upon a Recognisance in Chancery in the County of Midd. against B. And the Defendane pleads that the Plaintiff is Outlawed by the Name of A. of the County of Chester, to which the Plaintiff replies, that he is not una & eadem persona, this may be by the Body of the County of Midd. where the Writ is brought.

In a Quare Impedit for the Church de Uelbe, and the Defendane pleads that there is no such Church, the Venue shall not come de Corpore Comitatus, but de vicineto de Uelbe, for this is a place known, and it is intended the Church of Uelbee is within the wild. of Uelbee. Hob. 325.

In a Prohibition, if the Parties be at It upon a Custom de non decimando of Wood in the Wild of Sussex, the Venue shall be de Corpore Comitatus, for the Wild is not such a place, wherof the Court may have conuissance to be sufficient to have a Jury to come from thys, for the Wild is a Wood by intendment. Hob.

Heir Tried  
where the  
Land lyes,  
where non

In a real Action where the Demandant demands Lands in one County, as Heir to

his Father, and alledges his Birth in another County, if it be denyed that he is Heir, it shall not be Tryed where the Birth is alledged, but where the Land lyeth; for then the Law presumes it shall be best known who is Heir. But if the Defendant make himself Heir to a Woman (for that is the surer and more certain side, and the Mother is certain, when perhaps the Father is uncertain) and therefore there it shall be tryed where the Birth is alledged, because they have more certain consurance, than where the Land lyeth.

Cro. 3 part.  
818. Cro.  
2 part. 303.

Bastardy.

Non Concessit  
where the  
Land lies.

And so it is where Bastardy is alledged, the Tryal shall be in like Case, Mutatis mutandis.

Vifae.

If a Man plead the Kings Letters Patents, and the other party plead non concessit, it shall not be tryed where the Letters bear date, for they cannot be denyed, but where the Land lyeth.

Vifae, Of  
what places.

Every Tryal must come out of the Neighbourhood of a Castle, Manor, Town or Hamlet, or place known out of a Castle, Manor, Town or Hamlet, as some Forest, and the like, as before.

Where the  
Writ is  
brought at  
Common-  
Law.

Venire facias may be of a Forest, Burgo, Castro, Warda, Parco, &c. but not of a Le Baliva, Market, Walk, &c. nor de lieu commun, without alledging this to be out of a Vill or Parish. Siderfin 326. But after Merditt helped by the new Statute 16, 17 Car. 2. cap. 8.

Every Plea concerning the person, Plaintiff, &c. shall be tryed where the Writ is brought.

When the matter alledged extendeth into  
place at the Common Law, and a place  
within a Franchise, it shall be tryed at the  
Common Law.

Matters done beyond Sea may be tryed in  
England, and therefore a Bond made beyond  
Sea may be alledged to be made in any place  
in England, if it bear date in no place; but  
if there be a place, as at Burdeaux in France,  
then it shall be alledged to be made in quodam  
loco vocat. Burdeaux in France, in Illington in  
the County of Middlesex, and from thence  
shall come the Jury, 1 Inst. 261. Lach. 4. and

Matters done  
beyond Sea,  
how tryable  
in England.  
*Vide cap. 10.*

5. So if the Tenant plead that the Deman-  
dant is an Alien, born under the Obedience  
of the French King, and out of the Legiance  
of the King of England; the Demandant

Keeble 2 part.  
315.

may reply, that he was Born at such a place  
in England, within the Kings Legiance, and  
thereupon a Jury of twelve Men shall be  
charged, and if they have sufficient Evidence  
that he was Born in France, or in any other  
place out of the Realm, then shall they find  
that he was Born out of the Kings Legiance.  
And if they have sufficient Evidence that he  
was Born in England, or Ireland, or Guern-  
sey or Jersey, or elsewhere within the Kings  
Obedience, they shall find that he was Born  
within the Kings Legiance. And this hath  
ever been the pleading and manner of Tryal  
in that Case. So of other things done be-  
yond Sea, the adverse Party may alledge  
them to be done at such a place in England,  
from whence the Jury shall come, and in a  
special Verdict, they may find the things done  
beyond Sea. 1b. Lib. 7. 26.

Alien.

Things done  
beyond Sea.

Lib. 7. 26.

Part without  
the Realm,  
and part  
within.

So when part of the act is done in England, and part out of the Realm, that part that is to be performed out of the Realm, if Issue be taken thereupon, shall be tryed here by twelve Men, and they shall come out of the place where the Writ of Action is brought. Ib. Lib. 6. 48.

Full age tryed  
where the  
Land lies.

Error, for that Judgment was given by default against the Defendant, being an Infant, Issue was taken that he was of full Age. And Godfrey moved, whether the Tryal should be in Norfolk where the Land was, or in Middlesex, where the Action was brought. And the Court held, that it should be tryed in the County where the Land lay; and Tanfield said, it was adjudged in the Kings Bench, between Throgmorton and Burford. Cro. 3. part 818.

Where the  
Land doth  
lye.

Transitory  
Actions.

Questions of Title of Land (except by special Order of the Judges in some Cases) are to be tryed in the County where the Land lies, for the Law is, that all real and mixt Actions, as Wast, Ejectment, &c. must be brought in the County where the Land is. But Debt, Detinue, Account, Actions of the Case, Battery, &c. are in their own nature transitory, and yet they ought to be laid and tryed in their proper County where the Fact was done, unless the Court order the contrary, for some special Reasons; and if they are laid out of the proper County, daily practice tells us the Court may alter the Venue, upon Affidavis of the true place of the Fact.

All Criminal matters are to be tryed where the offence is committed. Criminal matters.

If the Venue arise in two Counties, the Jury upon two Venire facias shall come from both, six out of one County, and six from the other. Cro. 3. part. 646. But by consent of Parties, entred upon Record, it may be five out of one, and seven from the other, as appears, Cro 3. part. 471. where in Replevin, the Defendant avows for Damage done, the Plaintiff by his Replication, claims Common by Prescription in loco quo, &c. being Broadway in the County of Worcester, appurtenant to his Manor of D. in the County of Gloucester, and issue thereupon, two Venire facias awarded to the Sheriffs of the several Counties, and now seven of the County of Worcester appeared, and five of Gloucester. And although there ought to have been six sworn of each County, to try that issue, as appears 49 Ed. 3. 1. 31 H. 8. 46, by the assent of Parties, those twelve appeared, by advice of all the Justices, were sworn, and tryed the issue. And it was commanded that this Assent should be entred on Record; for otherwise it would be a strange Precedent.

This is called a Joynder of Counties. Finch 410. Jury out of two Counties. But out of more than two Counties it cannot be made.

In Assise of Common in Confinio Comitis, and the issue be, whether he had Common by prescription in Land in one County, appendant to a Manor in another County, this shall be tryed by both Counties.

The same Law is in Trespasse brought in one County (which cannot be in confinement) upon such an issue, the Tryal shall be

be per ambideux Counties. 49 E. 3. 2.  
See Rolls tit. Tryal 599. &c. Many Cases  
where the Jury shall come from two Counties.

In an Action upon the Statute of Marebridge, for taking a Distress in one County and chasing in another County; upon the Defendant being found guilty, the Tryal shall be only by the County where the chasing is, for this is all the cause of the Action. 4 H. 6. 4.

Escape.

In Escape upon Arrest in one County and an Escape in another County, upon the Defendant being found not guilty this shall be tried, where the Escape is laid, for the Action is upon the Escape. Rolls ib. 602.

Covenant in  
P. to sell at R.  
tried at P.

In an Action of Trover, apud Paxton in Com. Hunt. the Defendant pleads a Bargain and Sale, apud Royston in Com. Hertford, in the Market there, whereby he after converted them, apud P. in Com. Hunt. The Plaintiff saith, that he was possessed of those Goods apud P. in Com. Hunt. and that J. S. the Defendant stole them from him, and by Covenant betwixt him and the Defendant, at P. in Com. H. he sold them to the Defendant, as he hath pleaded: The Issue was upon the Sale made by Covenant, &c. And it was tried in the County of Hunt. and found for the Plaintiff. And it was moved to be a mis-tryal; for it ought to have been by Jury of the County of Hertford, or at leastwise by a Jury of both Counties: but it was adjudged to be well tried because the Sale is confessed, and the Issue is upon the Covenant alledged in Hertford, Cro. 3. part 311.

In Debt upon a Bond in London, the Defendant pleaded an Usurious Contract in the County of Warwick, the Plaintiff replied, that the Bond was made upon good consideration, Absque hoc, that it was made for such Usurious Contract: the Tryal shall be in the County of Warwick; for the Bond is confessed, and the Usury in Warwick is only in question; so if the issue be whether the Bond were made by Dures, the Tryal shall be where the Dures, and not where the Bond is supposed to be made. Cro. 3. part. 191.

Usurious Contract in another County.

A Dures shall be tryed there, not where the Action is brought.

Where Issue is taken upon a Surrender, it shall be tryed where it was alledged to be done, and not where the Manor is, of which the Copyhold is holden. ib. f. 260. tit. Visne 114.

Surrender.

In an Assumpsit laid at London, in Ward of Cheap; the Venire was De Parochia de Arundel in Warda de Cheap, whereas no Parish was mentioned before in the Count, and alledged that the Venire was ill laid in the Count, for a Venire facias may be of a Town, Parish, Manor, or other place known, but not of a Hundred or Ward, ib. and so it is judged, ib. Cro. 1 part. 165. for the Ward of a City, is but as the Hundred in a County. The Parish in London is in lieu of a Wille of the Ward of a Hundred. Roll. tit. Tryal 60, 621, 622. vide hic apres.

Ward or Hundred, no good Visne.

Where the Visne is laid to be at a City, City or Town, an Action brought in a Superior Court, or within the City, though it be both a City and County, the Venire facias may be de vicinis, Civitatis, Lach. 258. Though it hath been

Rolls 622,  
623.

So in all infe-  
rior Courts.  
Sciles 2.  
March 125.

London.

City.

Hundred.

been held not good, but that the Venire fac must be de Civitate, leaving out Vicinet. you may read in Stamf. 155. But note Case in Cro. 2 part. 308. and Bulstr. 1 part. 129. say, that all Venire facias's are awarded de vicinet. Civitatis, which is intended as to de Civitate it self, as de vicinet. infra Jurisdictionem of the City. And so it is, de vicinet. Civitatis, or de vicinet. or de Civitate County, Eborum, Norwich, Sarum, Bristow, London, and all other Cities which are Counties in themselves. In all places besides London no mention is made of the Parish or Ward. ib. 493. But in London the Parish and Ward is mentioned. And therefore it was adjudged, Cro. 2 part. 150. That it was not good to alledge any thing done in London generally; but it must be in what Parish from which a Venire may be; but where a thing is done in a City, in alta Warda there, and the Venire facias is from the City only, it is well, because it shall be intended there be no more Wards in the same City. Cro. 3 part. 28.

In an Action against the Hundred upon the Statute of Winton, &c. upon the Roll a Venire facias is awarded of Bradley, quod est proximum Hundredum, and the Venire facias is generally of Bradley. This is well, because by the Roll it appears that Bradley and the Hundred were all one. Roll. tit Tryals 598.

If a thing be laid done, apud Bristol, in Warda Sancte Marie in Warda de Ratcliff and the Venire facias is de Warda de Ratcliff this is not good. ib. 619.

But if it be alledged in a Ward in the City of Bristol, &c. the Venue shall be of the Ward, not de Civitate.

¶ Venire facias was awarded from T. and Ward.

de vicinet de T. and for this cause resolved to be ill, and not amendable. Cro. 2.

part. 399. Bro. tit. Ven. fac. 8.

¶ If the Issue be, Si rex concessit per literas patentes, The Tryal shall be, as hath been left out, ill.

where the Land lies, and not where the Patent was made, because the Patent is recorded; and if it be traversed, it shall

be tried by the Record, and therefore the Issue being upon non concessit, the Issue shall be upon the Patent; but where the Issue is upon non concessit, or non dimisit, of a

thing which passeth by Deed, the Tryal shall be where the Grant or Demise is al-

ledged: but of a Feoffment, or Lease for years pleaded, the Issue being non Feoffavit,

non dimisit, Livery ought to be made, and therefore the Tryal shall be where the Land lies. Cro. 2 part. 376. 3 part

Where the Defence is laid in the County in one County, and the Justification in another County, and the Plaintiff replies,

injuria sua propria, &c. The Venue shall be where the Justification is alledged; as,

Example for all, to illustrate. In an action upon the Case, for words supposed to be spoken at Bridge-North, in the County of Salop, the Defendant pleads, that he

took them as a Witness upon his Oath, and an Issue tried at Chard in the County of Somerset. The Plaintiff replies, de son

tort

Where the Action is laid in one County, and the Justification in another, the Tryal shall be where the Justification is.

tort demefne, &c. And thereupon it was tryed by a Venire facias of Bridg-North, and Error thereof assigned, because it ought to have been by a Visne of Chard, where the Justification arose, and it was held clearly to be a mis-tryal, and not aided by the Statute of Jeofailes, wherefore the Judgment was reversed. Cro. 3 part. 468, 261, 87. More 410.

Replevin, taking two Horses at such a place in Denford in Com. Northampton, the Defendant makes Conifans as Bayliff to the Lord Mountague of his Manor of S. which Manor is holden of the Honour of Gloucester, and that the place in which, &c. is within the said Honour, and alledges a Custom within the said Honour, on which Custom the parties were at Issue, and the Venire facias was from Denford the place of taking, which was moved after Verdict, for that the Venue was not so large as the Issue, which was the Honour, and of this Opinion was the whole Court of C. B. Pasch. 13 Car. Hull. vers. Benning.

Honours.

Slderfin 19.  
88.

But the great Question was, whence the Venue should arise in this Case, and by Bridgman Chief Justice, and Justice Hide, in a Case can a Venue arise from an Honour; and the Chief Justice said, he had caused the Prothonotaries to search for Precedents, and they could not find that ever a Venue did arise from an Honour, which is but a bundle of services and an incorporeal thing, from which no Venue can come, and yet an Honour may have Demefns, as the Honours of Grafton and Hampton have, but Gloucester not.

Chief Justice, and Justice Hide, sámed that the Venue should be de Corpore Comitatus. Hob. 266. 249. But when the Court was after moved for their Opinion, they bad them take a Venire facias at their persil, and would give no Opinion.

An Action of Debt was brought on a Bond to perform Covenants in an Indenture, whereby the Defendant had granted to the Plaintiff a walk called Shrob-walk, in the Forest of ~~\*\*\*\*~~ in Com. Northampton, and Covenanted for peaceable enjoyment, &c. and he was ousted per Earl of Northampton, who had right, on which Right Issue was joyned, and the Venire facias was from Shrob-walk.

Per Cur. Its not good, for it appears by the Record that Shrob-walk is not a Will: but if the Obligation had been laid to be made in Shrob-walk, the Venue should arise from thence, as a Will. Inter Stirt and Bales, Pasch. 4 Car. 2. B. R.

The Venue shall follow and be according to the Issue. Out of what Country.

As for words in Warwickshire, Thou art a thief, and stolest my Iron: The Defendant justifies and says, the Plaintiff stole the Iron in Leicestershire, and brought it into Warwickshire, and therefore he spake the words in Warwickshire. If the Plaintiff replies, de injuria propria absque tali causa, the Jury shall come from Leicester-shire, to which the absque tali causa refers, for the words are acknowledged. See Rolls tit. Tryal 598. 623.

*Vide hic ante & postea.*

From the  
place best  
known.

When part of the matter to be inquired of, is in one County or place, and part in another, the Tryal shall be there where the best Conuſance of the matter may be.

As in an Action upon the Case; the Plaintiff declares that the Defendant took the Horse of A. at S. and sold him at D. to the Plaintiff as his proper Horse, and afterwards A. retook the Horse. If the Defendant plead that the property was in him at the Sale, upon which Issue is joyned. The Venue shall be de S. where the taking is supposed, for there the property may be best known: which is only in question. Aff. 8. See several Cases in Rolls ib. 60 under this Head.

Where the  
Counties can-  
not joyn.

If the Issue be whether L. did ride from London to York, and from York to London within six days, this may be tried in London only, although part of the matter to be inquired of was done in each County.

In an Action of Battery in London, if the Defendant justifies in defence of his possession in D. in Essex, and the Plaintiff say de son tort demesne sans rien cause, this ought to be tried by both Counties if they might joyn, because he may be found guilty on another day, and therefore because they cannot joyn, this may be tried in Essex.

Of Actions in Confinio Com. See 1 Roll. 154.

In Case for Words in one County, if the Defendant justifies in another County, and the Plaintiff reply de son tort demesne, and although the Counties ought to joyn, if they could, and the Justification is principal

put in Issue, yet the Tryal may be in either County at the Election of the Plaintiff.

In Ejectment in London, upon a Lease made there of Land in Midd. if the Defendant plead not Guilty, this may be tryed in

London, because the Counties cannot joyn, although the Jury ought to enquire of the Ejectment in Midd. and Judgment affirmed by a Writ of Error. See Rolls tit. Tryal 622.

Rolls tit. Tryal 620.

London cannot joyn with another County. 49 E.3.20.

Two Counties may joyn although they be not nearest, nay, though twenty Counties be between them. Finch French. 59. Inst. 154.

But if it be of a Lease at Ickford of Land in Bury in Suffolk, the Venue must be of Bury, not of Ickford. 619.

If the Issue be taken upon the name or condition of the person, this shall be tryed in the County where the Writ is brought, E. 4. 8. for this may be well known. Rolls ib. 615.

Where the Writ is brought.

Where the Issue is to be tryed upon a point which shall be tryed by two Counties, if one cannot joyn with the other, this shall be tryed where the Writ is brought. E. 4. 8. But for this, see before where Counties cannot joyn.

In Debt in London, against J. S. of D. Essex, if the Defendant saith that he is at S. in Essex, at the time of purchase of the Writ, and not at D. this shall be tryed in Essex, and not where the Writ is brought, for none can know where he is so well as the County of Essex. 12 H.

Where in other County than where the Writ is brought.

Vide

Vide many Cases in Rolls ib. 605. & about this matter.

Where the  
escape was,  
and not  
where the  
Arrest was.

In an Action of the Case against a Sheriff, upon an Escape in London, and the Arrest laid to be in Southampton; adjudged, that the Visne shall be where the Escape was because that is the ground of the Action and not where the Arrest was. Cro 3 par 271.

Deceit.  
Escape.

Nota, In an Action of the Case for Deceit upon an Escape, the Court will not change the Visne out of the County where the Plaintiff supposes the thing to be done. Sider 87.

Scandalum  
Magnatum.

For in a Scandalum Magnatum, upon a common Affidavit. ib. 185.

Informations.

For in Actions upon Penal Statutes, they must be brought in their proper County. ib. 287.

Two Counties.

For where the cause of Action is in two Counties, and the Plaintiff laid his Action in one of them. ib. 405.

If the Plaintiff will be bound to give Evidence, but what arises in the County where he lays his Action, the Court will not change the Venue, upon the common Affidavit. ib. 442.

Counsellor at Law, his Venue shall not be altered, because of his attendance at Court. Modern Rep. 84.

In Debt upon an Obligation, payment was pleaded, apud domum mansionalem Rectorie de Much-Hadam, and the Venue laid was de vicineto de Much-Hadam, where it ought to have been de vicinet. Rectorie de Much-Hadam; but it was adjudged good.

cause Much-Hadam is here intended a Will.  
 Cro. 804. So you see that where a thing is  
 pledged to be done at the Capital House \* \* Rectoriz.  
 of D. there the Venire shall be of D. for that  
 is intended to be all one with the Will. But Castle.  
 where it is at the Castle of Hertford, &c.  
 where the Venire facias shall not be de vicineto Rolls tit. tryal  
 de Hertford, but de Castro de Hertford, for 621.  
 Castrum Hertford is intended a distinct place  
 by itself; and so of all Castles. Cro. 2 part.  
 139 More 862.

A Venire facias may be awarded of a Castle.  
 Rolls 618.

Where the Issue is not parcel of the  
 Manor of D. or the custom of a Manor is Manor.  
 in question, the Venire ought to be of the  
 Manor. Hob. 284. Cro. 2 part. 327. If  
 Manor be laid to be in a Will, the Ve-  
 facias may be of the Manor in the Will, Rolls tit. Try-  
 de vicineto manerii de Stansted-Hall in al 621.  
 Hadham. Cro. 2 part. 405. More 581.  
 Adels Case, li. 6. 14.

The Venue cannot be of a Scite of a Pa-  
 Rolls tit. Tryal 618.

In the Common-Bench, in Trespass, for  
 taking away a Bag of Pepper. The De-  
 fendant justified as Servant of the Mayor  
 Comonalty of London, for Wharfage  
 to them by the Custom of London, which  
 Plaintiff refused to pay. The Plaintiff  
 replied that the Custom did not extend to  
 him, because he was a Free-Man of the City London,  
 and ought not to pay Wharfage, to  
 which the Defendant rejoined, that the Cu-  
 stom extended to him, as well as to Stran-  
 gers; upon which Issue was joyned.

Recorder.

Resolved, 1. That the Issue should be tried per Pais, not by the mouth of the Recorder, because he certifies nothing but what the Mayor and Aldermen direct, who are concerned in the Cause.

Where the Tryal shall be by the County next adjoining.

2. That the Venire facias shall not be awarded to the Sheriffs of London, nor Middlesex, because the Tryals there are by Free Men. But it shall be to the County next adjoining, viz. to the Sheriff of Surry. Where any City is concerned, the Venire facias shall not be directed to the Officers of the City, but to the County next adjoining. Hob. 85. Stiles 137. More 871. vide l. cap. 2. See Hardres Reports, f. 309. See Learning concerning this matter.

If the Issue concern the Mayor and Commonalty of a Town, the Array shall be made all of Foreigners. 31 Assise 19. vide Rot. tit. Tryal 597.

So if the Issue concern the Mayor and Commonalty, &c. although they are no Parties, yet the Venire facias shall be directed to the Sheriff of the next County. 15 E. 4. 18.

Information sur Seizure.

See Hardres Reports, f. 16. &c. Concerning this matter in an Information upon a seizure in what place the Visne shall be, and the entry and manner of quashing one Venire facias, and awarding a Venire facias de novo &c.

Where a Man lends his Horse in one place, and he is spoiled in another, Visne where he is spoiled.

Where a Man lends a Horse to another to till his Land, and the Horse dies by excessive Labour, the Visne shall be from the place where the excessive Labour was, and not where the delivery was. More 88. vide

vide Hob. 188. Rolls tit. Tryal 615. Pasch.  
2. Car. 2. B. R. Horsley versus Potter. An  
Action of the Case was brought for misusing  
a Horse, in Itinere; the Contract was laid at  
Swaffham in Norfolk, and the riding to Pe-  
terborough in Northamptonshire, where the  
Horse dyed, it was tryed in Norfolk; and the  
Court seemed that it ought to have been try-  
ed in Northamptonshire where the damage  
was done, and not where the Contract was  
made, but it was aided by the Statute of Jeo-  
fanes, 17 Car. 2. cap. 17. (after Verdict)  
that Statute being then in force.

Where a promise is laid in one place, and  
the breach in another, the *Vifne* must be ac-  
cording to the event of the Issue, whether  
it be taken upon the promise or breach. But  
if no place be alledged for the breach, and  
it be taken upon it, the *Vifne* must be from  
the place of the promise, which shall be in-  
ferred right, where the contrary appears not,  
Godbolt. 274.

Promise in  
one place and  
breach in ano-  
ther. *Vifne*  
guided by the  
Issue.

Modern Rep-  
36, 37.

After 39 Eliz. In the Kings-Bench, Tres-  
pass, Assault and Battery, en Wilts, continu-  
ed the Assault in Middlesex, and adjudged  
that the Jurors shall come out of both Coun-  
ties. More 538.

The name of a Manor, or Land, or other  
real thing shall be tryed where it lyes, be-  
cause it is local; but the name or addition of  
a person, shall be tryed where the Action is  
brought, because this is transitory. Bro. tit.  
7. lib. 6. 65,

Misnomer.

Where the  
Land lies.

In Covenant upon an Indenture of Demise of the Rectory of Stoken-Church in the County of Oxford, That the Defendant had good Power and Authority to demise: The Indenture was alledged to be made at London and the Venire facias was awarded to the Sheriff of Oxon, and this being assigned in Error, Judgment was affirmed, and the adjudged to be good. More 710. Because the Rectory was in Comitatus Oxon. vii page 45.

Where the  
Land lies, and  
not where the  
Writ, &c.

In Debt upon an Obligation in one County to perform Covenants in a Lease, as the Land and payments were in another County; the Tryal shall be where the Land and payments are. 44 E. 3. 42.

In Debt upon a Lease in one County, as the payment of the Rent upon the Lease committed there also, but the Land was in another County, and the payment upon the Land; this shall be tryed where the Land and payment was, for he was bound to pay this there upon the Distress. ib.

But the Tryal should have been where the Writ was brought, if the payment had not been alledged to be where the Land was. ibid.

Where the  
Land and  
Writ, &c.

If Debt be brought for Rent upon a Lease for years, and the Action is brought where the Land is, but the Deed of the Lease bears date in another County, the Tryal shall be where the Land and Writ is brought. 45 E. 3. 8. The Issue being whether the Lessor had a conditional Estate or not, as to a lawful eviction.

If the Issue be in an Assise, whether the Defendant be the eldest Son of J. S. and his death is alledged in another County, yet this shall be tryed where the Land is. 46 Ass. 5.

Where the Land lies, and where nor.

If an Infant bring an Assise, and a Release of his Ancestors is pleaded against him, dated in another County, this must be tryed where the Release is dated, and not by the Assise, although the Plaintiff be an Infant, and the circumstances are to be enquired.

21 E. 3. 20. See Rolls ib. 611.

In Case if the Plaintiff declare upon a Trust at D. and of a wrong at S. upon not guilty, if it appear the Trust is not material, the Venue shall only come from S. and not from both places, one not being material.

Where from two places in one County, and where nor.

In case for stopping a way from such a place, to such a place, and that the obstruction is at D. Upon not guilty, the Venue shall come from D. only, for all the way is in Issue.

Vide hic. cap. 10.

If the Nar. be apud A. in Com. B. and the Venire is de Vill. & Paroch. de A. 'tis ill. Yelv. 104. 2 Cro. 586.

The Venire as large as the Nar. and no larger. Venire from two Vills.

When the Venue shall be from two Vills, Cro. 599. Yelv. 26, 182, 187.

In Trespals in one Will, and a Release pleaded in another Will, within the same County, upon non est factum, this shall be tryed per ambideux. Rolls ib. 624. vide hic. See Rolls ib. 615. many Cases about this.

Where the Venue cannot be from a Will, Hamlet or lieu conus, there it may be de Corpore Comitatus, for if it might not be so, the Cause could not be tryed.

De Corpore Com.

A lieu conus is a Castle, Manor or other notorious place well known, and generally taken notice of by those who dwell about it, and not a Close or Pasture of Ground, or such like place of no repute.

A Custom of a County is to be tryed in Corpore Comitatus, for the Custom runneth through the whole County.

Parish.

Where the Parish is named by way of denotation, or explanation of the place, where the Fact is alledged to be done, as in the Parish Church of Hauck-hucknol, then the Venire facias shall be of the Town, not of the Parish. Bulstr. 1 part, 60, 61.

Town.

If the Fact be alledged in King-street, in the Parish of St. Margarets in Corn. Midd. You have already heard that the Visne shall be from King-street, because it is intended to be a Town; but where it is alledged to be done at Grays-Inn-Hall, or Lincolns-Inn-Hall &c. in Holborn, the Visne shall be from Holborn, which is the Town; for as Yelverton said, it was never heard of any Venire facias to be had of any of the Inns of Court. Bulstr. 2. part 120. especially of the Hall, because it cannot be of a House, much less of a Hall.

Inns of Court.

Not from  
House or  
Hall.

In Ejectment upon a Demise made in Denham of Lands in Parochia de Denham prædict. The Visne may be of Denham or of the Parish of Denham, because Denham and Parochia de Denham prædict. are all one by intendment of Law. Bulstr. 2 part 209. More 709. Hob. 6. But when it appears by the Record, or is intended that the Parish is more spacious than the Town, as the

Parish.

Case

in More 837. where in Ejectment the lease was alledged to be made at Bredon of which in W. and W. Hamlets within the Parish of Bredon, there the Venire facias must be of Bredon, but of the Parish, because it appears, that the Parish extends further than the Town. Hob. 326.

Where an Action of Debt for Rent, is brought upon the privity of the Contract, by the Lessor, as against the Lessee, or his Executors, for Arrearages due in the life-time of the Testator, the Visne may be laid in any place; but where the Action is brought upon the privity in Estate, as against the Assignee of the Lessee, or his Executors, for Rent due after the Testators death, the Visne must be where the Lands lye. Lach. misprinted, 197, 262, 271. v. li. 3. 24.

For Rent where the Land lies, and when not.

And so it was adjudged in the Case of Hall and Arnold, Mich. 1656. B. R. And it was further adjudged there, the Case being of a lease made at London, of Lands in Monmouth-shire, rendering Rent payable at the Old Exchange, for which an Action is brought by the Heir. If there had been no place of payment, the Heir must have brought his Action where his Lands lye; but the place of payment being in another County, he has his Election, as on a Lease for Years of Lands in two Counties.

Walkers Case, in Debt upon a Lease of Land in another County, Nihil debet shall be pleaded where the Action is brought. Bro. tit. Visne 119. vide pag. 93.

Debt for rent of Land in another County.

Manor.

In Replevin brought by Strede against Hartly, for taking a Distress at Baildon, the Defendant made Conusance as Bayliff, because that locus in quo, &c. was holden of W. H. as of his Manor of Baildon, and upon Issue, hors de son fee, the Venire facias was de vicineto de Baildon; and upon motion that the Venire facias ought to have been, as well from the Manor as the Town, the Court adjudged it to be well enough, for that the Court shall not intend the Manor was larger than the Town, because it doth not appear so to be, though possibly it might, as like the Case of Town and Parish. Hob. 305, 326.

*Visne* next adjoining, in what Cases.

Cinque Ports.

Wales.

If the Sheriff return that there are no Freeholders of that Visne, or if the Visne be where the Kings Writ runs not, as in the Cinque Ports, &c. or in a place where the Men are privileged from serving on Juries out of that place, as the Isle of Ely, &c. the Plaintiff may pray a Venire facias of the Visne next adjoining, and if the Visne be in Wales (ou brieve le Roy ne court) the Venire facias shall be directed to the Sheriff of the next English County, to cause the Jury to come de propinquiori Visne of his County, to the Visne in Wales adjoining: for the Court shall not be ousted of the Plea. Fitz. Abridg. tit. Visne 8. Jurisdic. 24.

In an Action against a Hundred the Venire facias may come from the next Hundred generally.

In Trespass, if the Defendant plead not Guilty to part, and to the residue a Plea, which causes the Tryal of that to be by a Jury de Prochein Hundred, The Venire shall be awarded al Prochein Hundred for both Issues, because there ought not to be two Venire facias in one Action. Vide Rolls tit. Try- 596.

In an Appeal of Murder committed in the Cinque Ports, although the King be concerned, yet because this is betwixt common persons, the Venire facias shall be to the next adjoining Will. Ibid.

If the Issue be joyned of matter in Ire- Ireland.  
land, this shall be tryed by a Jury of the next County in England, ib.

If the Issue be to be tryed by the Venue of Manor, and the Plaintiff suggests that he is Lord of the Hundred in which the Manor is, and that all within the Hundred are within his Distress, if the Defendant acknowledge this, the Venue shall not be de Corpore Comitatus, but of the next Hundred, or if it should be de Corpore Comitatus, this should be tryed by the Tenants of the Manor. Rolls ib. 667.

If the Venue is in some part mis-awarded, or sued out of more places or fewer than it ought to be, so as some place be right named, this is aided by the Statute of Geofailes, which hath ended the differences in many Cases Reported in our Books, concerning this Point; wherefore I purposely omit them.

Prochein  
Hundred.

Vine mis-  
awarded in  
part.

Infancy where  
the Land lies.

Error, for that the Judgment was given by default against the Defendant, being an Infant, upon Issue that he was of full Age, adjudged, that the Tryal should be in Norfolk where the Land was, and not in Middlesex, where the Action was brought. Cro. 3 part 818.

May be out of  
a wrong place  
by consent.

If the Visne cometh from a wrong place yet if it be per assensum partium, and so entered of Record it shall stand; for Omnis Consensus tollit errorem. 1 Inst. 125.

Where the Issue is local the Visne cannot be changed by consent. Siderfin 339.

Holmes versus Sanders, Hill. 22, 23 C. B. R. Error to reverse a Judgment given in the Kings-Bench in Ireland, in Debt for Rent brought by the Assignees of a Revert on the Plaintiff declared of a Lease of Land in such a Parish in the Suburbs of Dublin, on nil debet pleaded, the Venire facias was from the said Parish, in Civitate Dublin, and Judgment there per Plaintiff; it was assigned for Error, because the Land lies in the Suburbs of the City, and the Venire facias was from a Parish in the City.

Per Cur. It is all one, for the Suburbs are always within the Franchise of the City, as Fleet-street is within the Suburbs of London, but the Strand not, though so reputed.

Note, it was adjudged Error, in an Inferior Court, that the Venire facias was awarded secundum consuetudinem Curie which ought to be per Curiam. Reader versus Moor, Mich. 1650. B. R.

By the Statute of 16 and 17 Car. 2. As-  
 Merdict, Judgment shall not be stayed  
 reversed, for that there is no right Venue,  
 as the cause were tryed by a Jury of  
 the proper County or place where the Action  
 is laid. This Act doth not extend to Appeals,  
 Judgments of Felony, &c. nor to Actions  
 upon penal Statutes, other than concerning  
 Customs and Subsidies, &c.

## C A P. IX.

## Challenges.

YOU have already seen of what Vifne  
 the Jury ought to be: The next thing  
 to be considered is concerning Challenges.

A Challenge is a Word common as well to  
 the English as to the French, and sometimes  
 affixeth to elator, and the Latin Word is  
 edicare; sometimes in respect of rebenge,  
 challenge into the Field, and then it is  
 ed in Latin vindicare; or provocare;  
 sometimes in respect of partiality or insuffi-  
 cy, to challenge in Court persons re-  
 sed on a Jury. And seeing there is no  
 per Latin Word to signifie this parti-  
 kind of challenge, they have framed a  
 and antiently written Chalumniare, and  
 umpniare, and Calumpniare, and now writ-  
 Calumniare; and hath no affinity with  
 Verb Calumnior, or Calumnia, which is  
 ved of that, for that is of a quite other  
 sense,

Challenge.

Calumniator.

sense, signifying a false Accuser, and that sense Bracton useth Calumniator, to a false Accuser: but is derived of the word Caloir or Chaloir, which in one signification is to care for or foresee. And for to challenge Jurors, is the mean to care or foresee that an indifferent Tryal be had: it is called Calumniare, to challenge, that to except against them that are returned for Jurors, and this is its proper signification but sometimes a Summons Summonitis is said to be Calumniata, and a Count to be challenged, but this is improperly. Forasmuch as Mens Lives, Names, Lands and Goods, are to be tryed by Jurors, it is most necessary that they be Omni exceptio ne majores, and therefore I will handle this matter more largely.

Challenge is twofold.

To the Array.

Array.

A Challenge to Jurors is two-fold, either to the Array, or to the Polls: to the Array of the principal Pannel, and to the Array of the Tales. And herein you may understand that the Jurors Names are ranked in the Pannel, one under another, the order or ranking the Jury, is called the Array, and the Verb, to Array the Jury, as we say in common speech, Battail Array, the order of the Battail. And this Array we call Arraignmentum, and to make the Array Arraiare, derived of the French word Arraier so as to challenge the Array of the Pannel at once to challenge or except against all Persons so arrayed or impannelled, in respect of the partiality or default of the Sheriff, Coroner, or other Officer that made the return.

And it is to be known, that there is a principal cause of Challenge to the Array and a Challenge to the Favour; principal in respect of partiality, as first, If the Sheriff or other Officers be of kindred or affinity to the Plaintiff or Defendant, if the Affinity continue. Secondly, If any one or more of the Jury be returned at the designation of the Party, Plaintiff or Defendant, the whole Array shall be quashed. So it is if the Sheriff return any one, that be more favourable to the one than to the other, all the Array shall be quashed. Thirdly, If the Plaintiff or Defendant have an Action of Battery against the Sheriff, or the Sheriff against either Party, this is a good cause of challenge. So if the Plaintiff or Defendant have an Action of Debt against the Sheriff (but otherwise it is, if the Sheriff have an Action of Debt against either Party) or if the Sheriff have parcel of the Land depending upon the same title, or if the Sheriff or his Bailiff which returned the Jury, be under the distress of either Party; or if the Sheriff or his Bailiff be either of Counsel, Attorney, Officer in robe, or of Robes, or Servant of either Party, Gossip, or Arbitrator in the same matter, and treated thereof. And where Subject may challenge the Array for unimpartiality, there the King being a Party, may also challenge for the same Cause, as kindred, or that he hath part of the land, or the like; and where the Array shall be challenged against the King, you shall read in our Books.

In Ejectment, the Plaintiff suggested that his Lessor, the Sheriff and Coroners were Tenants to a Dean and Chapter, whose Interest was concerned, and prayed the Venire facias to Elisors, and had it, being confessed by the Defendant, and the Court took it a principal Challenge, vide Hut. 24. Moor 470. Rolls Rep. 328. Duncomb and Ingleby, Trin. 15 Car. 2. B. R.

A Prayer to Elisors in Tryals at Bar may be at the Suit of the Defendant or Plaintiff but in Nisi prius at the prayer of the Plaintiff only, and per Cur. it is a principal Challenge that the Plaintiffs Lessor is Sheriff or Kindred, and if the Plaintiff doth not pray &c. the Defendant may challenge the Array at the Assises, Lord Brookes Case, Trin. 1657. B. R.

'Tis a good Challenge to the Array, that the Array is made and returned by two Coroners only, when there are four in the County, and that the Writ is returned by one of the Sheriffs of London only. And if a Bailiff return them that are out of the Franchise, or if an Array be to be of Persons out of a Franchise and Guildable, and the Bailiff return them, for the Sheriff ought to make it; and that some of the Pannel were returned by the Bailiff of a Franchise where the whole Pannel is returned as Array by the Sheriff, this is a good Challenge to the Array, for otherwise the Parties would lose their Challenge to the Array made by the Bailiff, Rolls Tit. Tryal 636.

If the Defendant sue the Writ of Hab. Corpus by Proviso at the return, the Plaintiff may Challenge the Array for kindred between the Defendant and the Sheriff, D. 15 El. 319. 13.

By what Person.

D. 15 El. 319. The Array was quashed although the Sheriff was the Neuse in descent, and the Tenant in the 7 descent from the Ancestor of whom both descended, Cousin to the Parties Wife, although herself no Party. So if the Wife be dead, if Issue be alive. These are good Challenges to the Array.

What Consanguinity is sufficient.

Alliance to one Party is a good Challenge. .

For Affinity.

If the Sheriff be allied at the making of the Pannel, and be dead at the Challenge, yet this is a good Challenge. 'Tis no Challenge that the Sheriff became of Kin after making the Pannel.

At what time.

'Tis no Challenge to the Array if all the errors be of Affinity.

It may be after a Tales prayed, for no challenge can be until the Jury is full. If the suggestion of Cousinage to have the Venue facias to the Coroners be denied, and the Venire facias is awarded to the Sheriff, the same Challenge shall not be allowed to the Array, but any other Cause may be alleged, than what was before denied.

Favourably made by the Sheriff or his Bailiff, or the Bailiff of a Franchise, is a good Challenge. That the Sheriff is within the Distress of a Party, or Servant of the Plaintiff, of the Robes of the Plaintiff, was Arbitrator for a Party, is Procura-

For favour.

tor and Maintainer of a Party, That the Sheriff purchased part of the Land in question, That the Pannel was made by the Bailiff of the Franchise of the other Party. These are good Challenges to the Array.

'Tis no principal Challenge that one Party is Tenant, or Servant to the Sheriff, but it is a good Challenge for far hour.

Denomination

It is a good Challenge to the Array, That the Sheriff made the Array, or put a Juror into the Pannel at the denomination of any of the Parties in favour to them, or of their Servants, or of one interested, or of a Maintainer, or of the Counsel, or of a Procurator.

Not if Strangers by the Sheriffs leave make the Pannel, or it be made at the request of both Parties.

For Malice.

'Tis a good Challenge to the Array, that one of the Parties has brought an Action of Debt against the Officer that returns the Pannel, or that there is a difference betwixt the Officer and the Party, that the Officer killed his Servant.

But not that the Officer has Debt against the Party, for he may demand his Debt without Malice.

How and in what manner the Challenge is to be made.

The Challenge ought to be quod tempore Pannelli præd. Arraiati, the Sheriff was Counsel to the Wife of the Defendant, &c. not afterwards, nor before, unless you aver that she was alive or had issue at the making the Pannel.

If the Challenge be taken for Cousinage, it ought to be shewn coment Cousin, but in such a Challenge to be a Juror 'tis not necessary to shew coment Cousin.

The manner and conveiance of the Cousinage alledged in a Challenge is not traversable. You may traverse the Cousinage prout without modo & forma. If the Challenge be that the Sheriff was Cousin to the Plaintiff, or within his distres; 'tis no Counterplea to say he is likewise of kin to the Defendant, or within his distres also.

What Counterplea of a Challenge is good and how to be pleaded.

Where the King is Party to the Issue, no Challenge shall be to the Array for favour, 8 Aff. 19.

Where the King is Party.

Otherwise if the Sheriff be Wadewelt of the Kings Crown, or such menial Servant.

If it be presented that J. S. hath made a Quittance in London and legents, 'tis no Challenge to the Array, to say the Sheriff of Middlesex is deputed and removable by the Commonalty of London, because this is the Suit of the King.

The King may make his Challenge that the Sheriff is within the Parties distres, although every Subject owes greater favour and obedience to the King, by reason of his Allegiance, than to any Lord by reason of Tenure.

In a Writ of Right, or any other Writ, a Baron of the Realm may excuse himself,

What Persons may be impannelled.

In a Writ of Right the Inquest ought to be all Knights. A Wanneret may be impannelled in this Writ; so may a Serjeant, if there be not Chivalers convenient.

In an Attaint upon a Recovery by false Verdict in an Assise, some Knights ought to be returned, and if there be not any in the Hundred where the Land lies, they shall be returned out of the County.

By default of the Sheriff, as when the Array of a Pannel is returned by a Bailiff of a Franchise, and the Sheriff return as of himself, this shall be quashed, because the Party shall lose his Challenges. And if a Sheriff return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his remedy against him.

Where there must be a Knight returned of the Jury.

*Note,* This Challenge may be taken by the Peer, but not by the other Party, who is not a Peer, for it is only the Privilege of a Peer,

*Modern Reports* 226.

If a Peer of the Realm, or Lord of Parliament be Demandant or Plaintiff, Plaintiff or Defendant, there must a Knight be returned of his Jury, be he Lord Spiritual or Temporal, or else the Array may be quashed: but if he be returned, although he appear not, yet the Jury may be taken of the residue. And if others be joyned with the Lord of Parliament, yet if there be a Knight returned, the Array shall be quashed against all. So in an Attaint, there ought to be a Knight returned to the Jury.

If two Peers sue as Gentlemen, and admit themselves so in pleading; 'tis no Challenge

lenge to say, no Knight is returned; for the Sheriff is in no fault.

And when the King is Party, as in ~~Tras~~ Where the  
berle of an Office, he that traверseth may King is Party.  
challenge the Array, as hereafter in this  
Section shall appear; and so it is in case of  
Life: And likewise the King may challenge  
the Array, and this shall be tryed by  
Tryors according to the usual course. The  
Array challenged on both sides shall be  
quashed.

And if two Estrangers make a Vannel,  
and not in favourable manner for the one  
Party or the other, and the Sheriff returns  
the same, the Array was challenged for this  
cause, and adjudged good.

If the Bailiff of a Liberty return any  
out of his Franchise, the Array shall be  
quashed, as an Array returned by one that  
hath no Franchise shall be quashed.

Challenge to the Array for Favour: He Challenge to  
that taketh this, must shew in certain the the Favour.  
Name of him that made it, and in whose  
time, and all in certainty: This kind of  
Challenge being no principal Challenge,  
must be left to the Discretion and Conscience  
of the Tryors; as if the Plaintiff or Defen-  
dant be Tenant to the Sheriff, this is no  
principal Challenge, for the Lord is in no  
danger of his Tenant, but ~~e~~ converso it is  
a principal Challenge; but in the other he  
may Challenge for Favour, and leave it to  
Tryal. So Affinity between the Son of the  
Sheriff, and the Daughter of the Party, or  
~~e~~ converso, or the like, is no principal Chal-  
lenge, but to the Favour; but if the Sheriff  
Party

For the King.

Barry the Daughter of either Party, or e converso, this (as hath been said) is a principal Challenge, or the like. But where the King is Party, one shall not challenge the Array for Favour, &c. because in respect of his Allegiance, he ought to favour the King more. But if the Sheriff be a Minister of the Crown, or other mental Servant of the King, there the Challenge is good; and likewise the King may Challenge the Array for Favour.

To the Array.

Note, Upon that which hath been said it appeareth, that the Challenge to the Array, is in respect of the cause of unindifferency, or default of the Sheriff or other Officer that made the Return, and not in respect of the Persons returned, where there is no unindifference or default in the Sheriff, &c. for if the Challenge to the Array be found against the Party that takes it, yet he shall have his particular Challenge to the Polls.

To the Polls.

In some Cases a Challenge may be had to the Polls, and in some Cases not at all. Challenge to the Polls, is a Challenge to the particular Persons, and these be of four kinds, that it is say, Peremptory, Principal, which induce Favour, and for default of Hundredors.

Peremptory Challenge.

Peremptory, this is so called, because he may challenge peremptorily upon his own dislike, without shewing of any cause, and this only is in case of Treason or Felony, in favorem vitæ; and by the Common Law, the Prisoner upon an Indictment or Appeal, might challenge thirty five, which was under

Under the number of three Juries; but now by the Stat. of 22 H.8. the number is reduced to 20 in Petite Treason, Murder and Felony; and in Case of High Treason, and Conspiracy of High Treason, it was taken away by the Stat. of 33 H.8. But now by the Stat. of 1 & 2 Phil. & Mary, the Common Law is revived for any Treason, the Prisoner shall have his Challenge to the number of 35, and so it hath been resolved by the Judges, upon conference between them in the Case of Sir Walter Raleigh and George Brooks: But all this is to be understood when any Subject that is not a Peer of the Realm is arraigned for Treason or Felony. But if he be a Lord of Parliament, and a Peer of the Realm, and is to be tryed by his Peers, he shall not challenge any of his Peers at all, for they are not sworn as other Jurors be, but find the Party guilty or not guilty, upon their Faith or Allegiance to the King, and they are Judges of the Fact, and every of them doth separately give his judgment, beginning at the lowest. But a Subject under the Degree of Nobility, may in Case of Treason or Felony, challenge for his Cause as many as he can, as shall be said hereafter. In an Appeal of Death, against Peers, they plead not guilty, and one joynt Venire facias is awarded, if one challenge peremptorily, he shall be drawn against all. Otherwise it is of several Venire fac.

No Challenge  
of Peers.

Note, That at the Common Law, before the Stat. of 33 E. 1. the King might have challenged peremptorily without shewing Cause, but only that they were not good for the

The Kings  
Challenge re-  
strained.

the King, and without being limited to any number, but this was mischievous to the Subject, tending to infinite delays and danger. And therefore it is enacted, Quod cætero licet pro Domino Rege dicatur quod juratores, &c. non sunt boni pro Rege: nec propter hoc remaneant inquisitiones, &c. sed assignent certam causam calumniæ suæ, &c. whereby the King is now restrained.

Principal  
Challenge to  
the Polls.

Principal, so called, because if it be found true, it standeth sufficient of it self without leaving any thing to the Conscience or discretion of the Triors. Of a principal challenge of Challenge to the Array, we have said some what already; now it followeth with brevity, to speak of principal Challenge to the Polls, (that is) severally to the Persons returned.

A principal Challenge is nothing else but such Matter which proves evident Favour or enmity in the Juror; and therefore it belongeth to the Justices to draw the Juror, and not to leave the decision to Triors. 21 E. 4. 11.

To the Polls.

Principal Challenges to the Poll may be reduced to four Heads. First, Propter honorem respectum, for respect of Honour. Secondly, Propter Defectum, for Want or Defect. Thirdly, Propter Affectum, for Affection or Partiality. Fourthly, Propter Delictum, for Crime or Delict.

Principal  
Challenges to  
the Polls.

First, Propter Honoris respectum, As a Peer of the Realm, or Lord of Parliament as a Baron, Viscount, Earl, Marquis and Duke, for these in respect of Honour.

*Propter honoris respectum.*

A Peer may challenge himself.

Peers and Commons.

of Nobility, are not to be sworn on Juries; and if neither Party will challenge him, he may challenge himself; for by Magna Charta it is provided, Quod nec super eum ibimus nec super eum mittemus nisi per legale iudicium parium suorum, aut per legem terræ. Now the Common Law hath divided all the Subjects into Lords of Parliament, and into the Commons of the Realm. The Peers of the Realm are divided into Barons, Bishops, Counts, Earls, Marquesses and Dukes; the Commons are divided into Knights, Esquires, Gentlemen, Citizens, Yeomen and Burghesses: And in Judgment of Law, any of the said Degrees of Nobility are Peers against another: As if an Earl, Marquess or Duke, be to be tryed for Treason or Felony; or a Baron, or any other Degree of Nobility against his Peer. In like manner a Knight, Esquire, &c. shall be tryed per Pares, and that by any of the Commons, as Gentlemen, Citizens, Yeomen or Burghesses; so as when any of the Commons is to have a Tryal, whether at the Kings Suit, or between Party and Party, a Peer of the Realm shall not be impannelled in any Case.

Secondly, Propter defectum.

Challenge, Propter defectum.

1. Patriæ, As Aliens Born.
2. Libertatis, As Villains or Bondmen, so a Champion must be a Freeman.
3. Annui census, i. e. liberi tenementi.

First, What yearly Freehold a Juror ought to have, that passeth upon Tryal of the Life of a Man, or in a Plea real, or in a Plea personal,

See before, cap. 7.

*Quorum quilibet habeat*  
4 l. &c.

personal; where the Debt or Damage in the Declaration, amounteth to forty Marks. Vide Littleton, Sect. 464. Secondly, the Freehold must be in his own Right, Free-simple, Free-tail, for term of his own Life, or for another Man's Life, although it be upon condition, or in the right of his Wife, out of ancient Demesne; for Freehold within ancient Demesne will not serve but if the Debt or Damage amounteth not to forty Marks, any Freehold sufficeth. Thirdly, he must have Freehold in the County where the cause of the Action ariseth, and though he hath in another it sufficeth not. Fourthly, if after his return he selleth away his Land, or if Cestui que vie, or his Wife dyeth, or an entry be made for the condition broken, so as his Freehold be determined, he may be challenged for insufficiency of Freehold.

In Cases of Treason and Felony, at common Law, want of Freehold was no cause of challenge; probos & legales homines, be sufficient. The Statute of 2 H. 5. is general as to that by the Statute 1 and 2 of Queen Mary. See the Lord Russels Tryal. Jan. 13. 1683.

It seems before the Statute 2 H. 5. in Actions where the Freehold was concerned the Jurors ought to have some Freehold. 3 H. 4. 4. By that Statute in all Pleas real and personal, where the Debt or Damage, or both together amount to forty Marks, the Juror must have forty Shilling Freehold. In an Attaint they must

to expend twenty pounds per annum.  
Rolls tit. Tryals f. 648.

In an Accompt upon the receipt of one hundred Shillings, if he count to his Damage two hundred Shillings, if the Juror say but twenty Shillings, or under forty Shillings, 'tis sufficient, because he shall recover Damages, and so this is not within the Statute 10 H. 6. 18. for the sufficiency of Jurors. See Rolls tit. Tryal 648.

A Man seised of the Manor of Dale, enters a Stranger upon condition to pay yearly to J. S. and his Heirs forty Shillings Rent. J. S. dyes seised of this Rent, and then his Heir takes it, yet the Heir hath not sufficient Freehold.

Land to the value of forty Shillings is given to the Husband and Wife, and the issue of their two Bodies begotten, who if they issue a Son, the Husband gives the land by Fine to an Estranger and his Heirs, and dyes, the Wife enters and dyes, and the Son hath not sufficient Freehold to be a Juror.

A Man seised of Land to the value of forty Shillings within the County of Middlesex, gives Land to the value of twelve within the County of Sussex, and grants a Rent of forty Shillings, issuing out of all the said Land to a Stranger, in Fee, the Stranger hath sufficient Freehold to be a Juror in both Counties. See many speculative Cases upon this subject, in Williams his History upon the Statute 35 H. 8. cap. 6.

Challenges  
propter defectum  
hundredorum.

Hundredors.

No Hundredors.

4. Hundredorum : First, by the common Law in a Plea real, mixt and personal, there ought to be four of the Hundred (where the cause of Action ariseth) returned for the better notice of the cause ; for Vicini vicinorum facta præsumuntur scire. And now Sir Littleton wrote, in a Plea personal, if the Hundredors appear, it sufficeth ; and in an Attaint, although the Jury is double, yet the Hundredors are not double. Secondly, if the party hath either Freehold in the Hundred, though it be to the value but of half an Acre, or if he dwell there, though he hath no Freehold in it, it sufficeth. Thirdly, if the cause of the Action riseth in divers Hundreds, yet the number shall suffice as if it had come out of one, and not several Hundredors of each Hundred. Fourthly, if there be divers Hundreds within one Leet or Rape, if the party hath any Freehold, or dwell in any of the Hundreds, though not in the proper Hundred, it sufficeth. Fifthly, if the Jury come de Corpore Comitatus, or de proximo Hundredo, where one party is Lord of the Hundred, or the like, there need no Hundredors be returned at all. Sixthly, if a Hundredor after he be returned, sell away his Land within that Hundred, yet shall he not be challenged for the Hundred, for that his name remains ; otherwise as hath been said for the insufficiency of Freehold, for his fear to defend, and to have Lands wasted, &c. where is one of the Reasons of Law is taken away. Seventhly, he that challengeth for the Hundred, must shew in what Hundred it is, and not drive the other party to shew it. Eighthly,

his challenge for the Hundred is not  
 soliciter, but secundum quid ; for though it  
 be found that he hath nothing in the Hun-  
 dred, yet shall he not be drawn, but remain  
 at home. For H. that is, besides for the Hundred ;  
 albeit he dwelleth, or have Land in the  
 Hundred, yet must he have sufficient Free-

Note, This challenge for want of Hundre-  
 dors must be given in writing presently, and  
 the other party is to demur thereto, if oppo-

If a challenge be, that there is not any  
 Hundredor returned, it may be averred to the  
 Court, that there is not any sufficient with-  
 in the Hundred, which is not within the Fee  
 of the Plaintiff, although this be not return-  
 ed by the Sheriff, and this be found true by  
 the Jurors, the Array shall be affirmed. 45  
 H. 1.

If the King be made Party by aid prayer,  
 and sufficient Hundredors do not appear, nor  
 returned, yet the Pannel shall not be quash-  
 ed, but a Tales of Hundredors shall be return-  
 ed. But betwixt common persons in such  
 cases the Pannel shall be quashed, and this  
 shall not be only a challenge to the Heads.

3. 43.

If the Sheriff return quod non sunt plures  
 Hundred, he shall take of the Hundred ad-  
 vantage, which shall be sufficient. 19 H.  
 8.

If the Juror hath sufficient Land within  
 the Hundred, although he doth not dwell  
 in the Hundred, yet he is a sufficient  
 Hun-

Hundredor. 9 H. 6. 66. Nay though he die in another County.

If he be not Hundredor at the return of the Venire, but be at the return of the stringas, yet this doth not take away the challenge.

At what time the Challenge must be.

After four are sworn, or after a challenge to the Polls, there can be no challenge to the Hundred. Rolls tit. Tryal 636.

Who shall be a sufficient Hundredor, Williams his Reading aforesaid.

If he dwell or have Assets within a Leet, Rape, Franchise or Vill, where Venue is, he is a sufficient Hundredor.

If he hath Assets in Kent, Common, any sort, Market, Fair, Vicary, Passage, Let, Office of Bayliwick, &c. is a sufficient Hundredor; otherwise of Advowson, &c.

Challenges proper affectum.

3. Propter affectum: and this is of sorts, either working a principal challenge or to the favour. And again a principal challenge is of two sorts, either by Judgment of Law, without any Act of his, or by Judgment of Law upon his own Act.

Principal Challenge.

And it is said that a principal challenge is, when there is express favour, or express malice. First, without any Act of his, if the Juror be of Blood or Kindred to either Party, Consanguineus, which is compound ex Con & sanguine, quasi eodem sanguine natus, as it were issued from the same Blood, and this is a principal challenge, for the Law presumeth that one Kindred doth favour another before a Stranger, and how far remote soever he is of Kindred.

Kindred. Siderfin 2 part 155.

et the challenge is good. And if the Plain-  
 iff challenge a Juror for kindred to the De-  
 fendant, it is no Counter-plea, to say that  
 he is of kindred also to the Plaintiff, though  
 he be in a nearer degree. For the words of  
 the Venire facias, forbid the Juror to be of kin-  
 dred to either Party.

If a Body Politick or Incorporate, sole  
 or aggregate of many, bring any Action  
 that concerns their Body Politick or Inco-  
 porate, if the Juror be of kindred to any that  
 is of that Body (although the Body Poli-  
 tick or Incorporate can have no kindred,  
 yet) for that those Bodies consist of natural  
 Persons, it is a principal challenge. A Bas-  
 tard cannot be of kindred to any, and there-  
 fore it can be no principal challenge. And  
 it is to be known, that Affinitas, Affi-  
 nity hath in Law two senses. In its pro-  
 per sense it is taken for that nearness that  
 is gotten by Marriage, Cum duæ cognatio-  
 nes inter se divisæ per nuptias copulantur, &  
 una ad alterius fines accedit, & inde dicitur  
 affinitas. In a larger sense Affinitas is taken  
 for Consanguinity and kindred, as in  
 the Writ of Venire facias, and elsewhere.  
 Consanguinity, or Alliance by Marriage is a prin-  
 cipal challenge, and equivalent for Consan-  
 guinity, when it is between either of the  
 parties, as if the Plaintiff or Defendant  
 marry the Daughter or Cousin of the Juror,  
 or the Juror marry the Daughter or Cousin  
 of the Plaintiff or Defendant, and the same  
 continues, or Issue be had. But if the  
 Son of the Juror hath married the Daughter  
 of the Plaintiff, this is no principal chal-  
 lenge,

Bodies Poli-  
 tick.

Affinity.

Peremptory  
Challenge up-  
on Record.

lence, but to the favour, because it is not  
between the Parties. Much more may be  
said hereof, sed summa sequor fastigia rerum.

As if he hath formerly tryed the Cause, al-  
though reversed by Error, or upon the same  
title; if the Record be not shewed, this chal-  
lenge is not peremptory. For he that ground  
a challenge upon a Record, &c. ought to have  
the Record ready. 33 H. 6. 55. The Record  
ought to be exemplified. 21 E. 4. 74.

'Tis a good challenge to say the Juror was  
attainted in an Attaint or Writ of Conspi-  
racy; but attainder in a Writ of Forgery or  
falle Deeds upon the Statute 1 H. 5. 3. (be-  
'tis upon 5 Eliz.) 14. is not, because this At-  
tainder is given of late time by the Statute  
33 H. 6. 55.

In a Writ of Conspiracy, 'tis a principall  
challenge, That the Juror was one of the  
Indictors, although the Tryal is now on  
the Conspiracy, and not upon the first point  
viz. the Felony.

In Trespasse, if one justifie as Master, and  
the other as Servant; 'tis not a principall  
challenge to say the Juror passed in the  
first Issue for the Master, but he ought to  
conclude, & is int favourable. 18 E. 4.  
12.

If two plead not Guilty, and first one  
Issue is tryed and then the other is tryed  
'tis no Challenge to say the Juror tryed the  
other Issue, and gave Damages, of which  
Damages he shall be charged if he be attainted  
in an Attaint, for perhaps the Defendant  
will be found not Guilty.

That the Juror is within the distress of Deins distress, any of the Parties, is a good cause of challenge. And so it is, if he be within the distress of any person concerned, although no Party to the Action. As within the distress of A. the Master of the Defendant, who justifies as Servant to A. by reason of his freehold; and the Issue is sur le frankement. So for him in reversion received, within the distress of the Tenant for Life. And so in an Action by the Tenant for Life, within the distress of him in reversion: these are good challenges.

So in an Action by Dean and Chapter, within the distress of the Chapter, or one of the Chapter, are good challenges.

Consanguinity of the half Blood is a Principal challenge: If the Juror be at the sixth degree, if it can be shewed it is good.

Principal for  
Consanguinity.

In an Action by the Dean and Chapter, or Mayor and Commonalty, Brother to one of the Commonalty, or to one of the Commons, is a good challenge: so to any person concerned in interest, although no party to the Action. As Cousin to the Patron, or Parson, &c. so in Attaint to one of the Just Jury.

But in an Ejectment, and not Guilty pleaded; 'tis no challenge to the Array that the Sheriff is Cousin to the Lessor of the Plaintiff: for it doth not appear that the Title of him in Reversion shall be in question, and he in Reversion is no Party to the Action. See it so adjudged upon De Witt's Case. Rolls tit. Tryal 653. But now in feigned Ejectments it is otherwise, because

cause the Title of the Vessoz is only in question.

Principal for  
Affinity.

'Tis a good challenge that the Juror is Cossip to the Plaintiff, & sic e converso; and so although the Son be dead; for the spiritual Affinity remains, and so is Curat for the Juror. That the Juror hath married the Sister of the party. That the Daughter of the Uncle of the Juror hath married the Uncle of the party. Cousin to the Wife of the party. These are good challenges, although the Wife, &c. is dead, if her Issue be alive; otherwise if she be dead without Issue, for then the cause of the favour is determined.

But 'tis no challenge to say the Juror is Brother to one who married the Sister of the party; nor that the Son of the party married the Sister of the Juror: because these are not parties to the Action.

In Attaint 'tis a good challenge to the Juror, that he hath married the Sister of the Wife of one of the petit Jury, for the Alliance.

Principal for  
favour.

If a Juror declare the right of one Party, or give his Verdict before hand, or take money, this is a principal challenge; but if he promise a party, this is not a principal challenge, but for favour.

Principal for  
malice.

If the Action depending betwixt the party and Juror, be such as implieth Malice, this is a good challenge; but not if it imply not Malice.

That the party hath an Appeal depending against the Juror, or the Juror against the party, or Action of Battery. That they are in debate and wrangling, &c. are good challenges.

Yes. For Actions of Debt or Trespass, Quare clausum fregit, &c. For that the Brother, &c. of the Party, hath Actions against the Juroz.

That the Juroz was bozn out of the Kings Peremptory. Disceance; for although he came into England an Infant, and is swozn to the King, yet he continues an Alien; and that he is Alien. Outlawed, for then he is not legalis homo, are good challenges.

If the Juroz says that he will pass for one party, because he knows the verity of the matter, this is no challenge: But if he says 'tis for favour, 'tis a good challenge, if the Tryors find he spoke for favour, and not for truth.

In an Action betwixt the King and a party, King. The Subject cannot take any challenge for favour, as in an Indictment of Warretry, &c. The Defendant cannot challenge a Juroz for favour to the King.

If the Record be in the same Court, it need not be shewn, but if it be in another Court, ought to be shewed; or else 'tis no principal challenge.

How Challenges shall be taken of a Record.

After the Array is affirmed, there shall not be such challenge to a Juroz which would have been a sufficient challenge to the Array.

At what time they may be taken.

'tis not a good challenge that the Juroz was impannelled at the denomination of a party, for this had been a good challenge to the Array.

If a Man challenge a Juroz for non-sufficiency of Freehold, and this is adjudged against him, yet he may challenge for favour, and this shall be tryed. 10 H 6. 18.

If the Jury upon finding of the principal do not tax the Damages, for which a Verdict facias issues to the same Jurors, to tax the Damages, the parties cannot take any challenge for a cause before the first Tryal. But for a cause arising after they may. And so against les primes Jurors.

King.

The King cannot challenge a Juror after he is sworn, unless it be for a cause arising after he is sworn.

In what cases he which challenges ought to shew the cause presently.

If the Defendant challenge the Array which is found against him, or he release the challenge, and the Array is affirmed, and afterwards he challenge a Juror; he ought to shew the cause presently.

But if there be two Defendants, and one challenge the Array, and afterwards both challenge a Juror; the other shall not shew the cause presently.

If a Juror be challenged, and there be enough of the Pannel besides, the cause of challenge need not be shewed unless the other side challenges touts peravail.

If any of the Jurors be sworn, and there be not sufficient, for which a Tales is granted, and at the return one of the premier Jurors is challenged, the cause ought to be shewed presently, he being sworn before.

King.

In an Action between the King and common person, as in an Indictment of Warretry, presentment of nuisance, &c. the Defendant if he challenges any Juror, must shew the cause presently.

But in an Inquest betwixt the King and a Stranger, the Stranger need not shew the cause presently; for in this case the King is as a common Person of the Realm.

Cause ought to be shewed before the Tales be perused.

If both Parties challenge, although for Treason, Criminal causes, as if one be for Favour, and the other Peremptory; yet the Juror shall be sworn without shewing cause.

It may be in an Inquest before the Sheriff In what In-  
to Inquire of Waste, both to the Array and quest a Chal-  
Polls. lenge may be.

But not in an Inquest of Office, as in a Writ of Inquiry of Damages.

In a Writ of Right a Challenge may be to the Polls del 4 Chivalers return.

Not of Coynage to the Witnesses coming to try the Dæd in an Assise.

If one Party challenge the Array which Tryal and  
is affirmed, and afterwards challenge a Juror; Triors and  
he ought to shew cause presently, and this Challenges.  
shall be tryed presently; but otherwise of the other, who did not take the Challenge to the Array.

The Challenge of him who first challenged, shall be first tryed; although the first be for Favour, and that of the others be riens as H.

If the Venue be of two Counties, and two Pannels challenged, the Esliors shall be of one Pannel and the other of the other.

If the Array be challenged, the Court to the Array may chuse two Triors, according to their discretion, 29 Aff. 15. 19 H. 6. 9.

What Chal-  
lenge they  
may try.

If an Action be depending between the Juror and one of the Parties, and for this he is challenged, and the other says that this is brought by Covin; the Triors may try this; for although the Action is of Record yet the Covin is not.

Evidence.

The Juror may be examined upon a Voir dire, to any Challenge that is not to his dishonour; but the Triors are not bound by his Oath.

The Triors after they are sworn may go at large by assent of the Parties until another day.

In what cases  
a Challenge or  
Affirmance by  
one shall serve  
for others.

In Trespasse against two who plead in issue, and a Venire fac. is returned, although one accept the Array, yet the other may challenge it, and if it be found, the Array shall be quashed against all. So in an Appeal against Principal and Accessory, for one shall disinherite the other.

But in an Appeal by two, if the Defendant challenge a Juror, and one of the Plaintiffs agree to this; the other shall not be received to say that this is by Covin, but the Juror shall be drawn in favour to the Life of Man.

And yet in a Præcipe quod reddat by two, and the Tenant challenge the Array, because the Sheriff is Collip to one of the Demandants, and one Demandant acknowledges the Challenge, the other may say that this is not so, and have it tried, Rolls Tit. Try. 662. &c.

Ley Gager.

In Gager de Ley none shall be challenged for favour or insufficiency, &c.

If there be a Challenge for Cofinage, he that takes the Challenge must shew how the Juror is Cousin. But yet if the Cofinage, that is, the effect and substance be found, it sufficeth; for the Law preferreth that which is material, before that which is formal.

If the Juror have part of the Land that dependeth upon the same Title. Depending on the same Title

If a Juror be within the Hundred, Let, or any way within the Seigniorie, immediately or mediately, or any other distress of either Party, this is a principal Challenge. But if either Party be within the distress of the Juror, this is no principal Challenge, but to the Favour.

If a Witness named in the Dæd be returned of the Jury, it is a good cause of Challenge of him. So if one within age of one and twenty be returned, it is a good cause of Challenge. Witness. Infant.

Upon his own Act, as if the Juror hath given a Verdict before, for the same cause, albeit it be reversed by Writ of Error, or if his Verdict Judgment were arrested. So if he hath given a former Verdict upon the same Title or Matter, though between other persons. But it is to be observed, that I say speak once for all, that in this or other Cases, he that taketh the Challenge must shew the Record, if he will have it take place as a principal Challenge, otherwise he must conclude to the Favour unless it be a Record of the same Court, and then he must shew the Day and Term. Challenges arising from the Jurors own Act. Former Verdict.

Indictment.

So likewise one may be challenged, if he was Indictor of the Plaintiff or Defendant, either of Treason, Felony, Misdemeanor, Trespass, or the like in the same cause.

Godfather.

If the Juror be Godfather to the Child of the Plaintiff or Defendant, or a convert, this is allowed to be a good Challenge in our Books.

Arbitrator.

If a Juror hath been an Arbitrator chosen by the Plaintiff or Defendant, in the same Cause, and have been informed of, or treated of the Matter, this is a principal Challenge. Otherwise if he were never informed nor treated thereof; and otherwise if he were indifferently chosen by either of the Parties though he treated thereof. But a Commissioner chosen by one of the Parties, for examination of Witnesses in the same cause is no principal cause of Challenge; for it is made by the King under the Great Seal and not by the Party as the Arbitrator is but he may upon cause be challenged for Favour.

Arbitrator in another matter is no cause of Challenge.

Counsel.

If he be of Counsel, Servant, or of Robber or Foe, or of either Party, it is a principal Challenge.

Eat or Drink  
at the Parties  
charge.

If any after he be returned, do Eat and Drink at the Charge of either Party, it is a principal cause of Challenge, otherwise it is of a Trio, after he be sworn.

Actions of  
Malice.

Action brought either by the Juror against either of the Parties, or by either of the Parties against him, which may imply Malice.

Malice or Displeasure are causes of principal Challenge, unless they be brought by Covin, either before or after the return; for if Covin be found, then it is no cause of Challenge; other Actions which do not imply Malice or Displeasure, but are to the Favour, as an Action of Debt, &c. here 3.

In a cause where the Parson of a Parish is Party, and the Right of the Church cometh in debate, a Parishioner is a principal Challenge. Otherwise it is in Debt, or any other Action where the Right of the Church cometh not in question.

Parson and  
Parishes.

If either Party labour the Juror, and give him any thing to give his Verdict, this is a principal Challenge. But if either Party labour the Juror to appear, and to do his Conscience, this is no Challenge at all, but law for him to do it.

To labour the  
Jury.

That the Juror is a Fellow Servant with either party, is no principal Challenge but to the Favour.

Fellow Ser-  
vant.

Neither of the parties can take that Challenge to the Polls, which he might have had in the Array.

To the Polls.

Note, If the Defendant may have a principal cause of Challenge to the Array, if the Sheriff return the Jury, the Plaintiff in that case may for his own expedition, allege the same, and pray Process to the Coroners, which he cannot have, unless the Defendant will confess it; but if the Defendant will not confess it, then the Plaintiff shall have a Venire facias to the Sheriff, and the Defendant shall never take any Challenge.

Venire facias  
to the Coro-  
ners.

Challenge for that cause, and so in all cases. But on the part of Defendant, in such matter shall not be alledged, and Process prayed to the Coroners, because he may challenge the Jury for that cause, and cannot be at no prejudice.

Challenge to  
the Favour.

Challenge concluding to the Favour, where either party cannot take any principal Challenge, but sheweth causes of Favour, which must be left to the Conscience and Discretion of the Tryors, upon hearing their Evidence to find him favourable or not favourable. But yet some of them come nearer principal Challenge than other; As if a Juror be of Kindred, or under the distrust of him in the Reversion or Remainder, or in whole Right the Abowry or Justification is made, or the like: These be principal Challenges, because he in Reversion or Remainder, or in whole Right the Abowry or Justification is, is not party to the Record; otherwise it is, if they were made parties by Aid, Receipt or Voucher, and yet the cause of Favour is apparent; so is of all principal causes, if they were parties to the Record. Now the causes of Favour are infinite, and thereof somewhat may be gathered of that which hath been said, and the rest I purposely leave the Reader to the reading of in our Books concerning the Matter. For all which the Rule of Law is That he must stand indifferent as he stands unsworn.

Favour.

King.

The Subject may challenge the Poll where the King is party. And if a Man be outlawed of Treason or Felony at the

of the King, and the party for avoiding thereof alledgeth Imprisonment, or the like, at the time of the Outlawry, though the same be joyned upon a collateral Point, yet shall the party have such Challenges, as if he had been arraigned upon the Crime it self, for this by a mean concerneth his Life also.

Propter delictum, As if the Juror be attainted or convicted of Treason or Felony, or for any Offence to Life or Member, or in Attaint for a false Verdict, or for Perjury as a Witness, or in a Conspiracy at the Suit of the King, or in any Suit (either for the King, or for any Subject) be adjudged to Pillory, Tumbrel, or the like, or to be branded, or to be stigmatised, or to have any other Corporal Punishment whereby he cometh Infamous, (for it is a Maxim Infamous. Law, Repellitur a sacramento infamis,) these and the like are principal causes of Challenge. So it is if a Man be outlawed Outlawed. in Trespass, Debt, or any other Action, or he is Exlex, and therefore is not legalis homo. And old Books have said, That if he be excommunicated, he could not be of a Jury.

A Bastard may be of a Jury, yet may be Bastard. challenged if he be of Kindred, Jenk. Cent. 1. cap. 90.

See the Statutes of W. 2. and Artic. supra Martas, what persons the Sheriff ought to return on Juries. And see F. N. B. breve de non ponendis in Assisis & juratis; and the Register in the same Writ. And see there what remedy . Who ought to be on Juries.

remedy the party hath that is returned against Law.

At what time  
Challenges  
must be taken.

It is necessary to be known, the time when the Challenge is to be taken. First, He that hath divers Challenges, must take them all at once, and the Law so requires indifferent Trials, and divers Challenges are not accounted double. Secondly, If a party be challenged by one party, if after he is tried indifferent, it is time enough for the other party to challenge him. Thirdly, After Challenge to the Array, and the Jury duly returned, if the same party take Challenge to the Polls, he must shew cause presently. Fourthly, So if a Juror be formerly sworn, if he be challenged, he must shew cause presently, and that cause must rise since he was sworn. Fifthly, When the King is party, or in an appeal of Felony, the Defendant that challenges for cause, must shew his cause presently. Sixthly, If a Man in case of Treason or Felony, challenge for cause, and he be tried indifferent, yet he may challenge him peremptorily. Seventhly, A Challenge for the Hundred must be taken before so many be sworn as will serve the Hundredors, or else he loseth the advantage thereof.

Writ of Right

In a Writ of Right, the Grand Jury may be challenged before the four Knights, before they be returned in Court; for after they be returned in Court, there cannot any Challenge be taken unto them.

Nota, The Array of the Tales shall not be challenged by any one party, until the Array of the principal be tried; but if the Plaintiff challenge the Array of the principal, the Defendant may challenge the Array of the Tales. After one hath taken Challenge to the Poll, he cannot challenge the Array.

The Array of the Tales.

Now it is to be seen how challenge to the Array of the principal Pannel, or of the Tales, or of the Polls shall be tried, and who shall be Triors of the same, and to whom the Process shall be awarded.

If the Plaintiff alledge a cause of Challenge against the Sheriff, the Process shall be directed to the Coroners; if any cause against any of the Coroners, Process shall be awarded to the rest; if against all of them, then the Court shall appoint certain Esors or Esliors, (so named ab eligendo) before they are named by the Court, against whom no Return no Challenge shall be taken to the Array, because they were appointed by the Court, but he may have his Challenge to the Polls. Note, If Process be awarded for the partiality of the Sheriff, though there be a new Sheriff, Process shall never be awarded to him; the Entry is, Ita quod Vicecomes se non mittat. But otherwise it is, for that was Tenant to either party, or the

Coroners.

Esliors.

If the Array be challenged in Court, it shall be tried by two of them that be impanelled to be appointed by the Court: for the Triors in that case shall not exceed Two Triors. the

Demur to a  
Challenge,  
how deter-  
minable.

Array of the  
Principal and  
Tales.

Two Triors.

Trials of Chal-  
lenges.

the number of two, unless it be by consenc.  
But when the Court names two for some  
special cause alledged by either party, the  
Court may name others; if the Array be  
quashed, then Process shall be awarded, *u*  
*supra*. If there be a demur to a Challenge,  
the Judge before whom the cause is to be  
tried, may determine it, or adjourn it to be  
heard another time, *Stiles* 464. Vide *Bulfinch*  
1 part 114.

If a Pannel upon a Venire facias be re-  
turned, and a Tales, and the Array of the  
principal is challenged, the Triors which  
try and quash the Array, shall not try the  
Array of the Tales; for now it is, as if  
there had been no appearance of the prin-  
cipal Pannel; but if the Triors affirm  
the Array of the Principal, then they shall  
try the Array of the Tales. If the Plaintiff  
challenge the Array of the Principal, and  
the Defendant the Array of the Tales, then  
the one of the Principal and the other of  
the Tales shall try both Arrays. For other  
matter concerning the Tales, see in *Good*  
*Reports*, matters worthy of observation.  
When any Challenge is made to the Polls,  
two Triors shall be appointed by the Court,  
and if they try one indifferent, and he be  
sworn, then he and the two Triors shall try  
another; and if another be tried indifferent,  
and he be sworn, then the two Triors  
cease, and the two that be sworn on the  
Jury shall try the rest.

If any of the Jury, after some of them be  
sworn, be challenged, those that are sworn  
are to say, whether he that is challenged

be indifferent or not. But if the first or second Man be challenged, then the Court doth use to appoint some of them, (who it pleaseth,) that shall be afterwards sworn to try the indifferency of the person challenged.

1. All Challenges must be taken before the Jurors are sworn. Rules concerning Challenges

2. If one challenge a Juror, and it be found against the Challenger, he may not challenge the Juror for the second cause.

3. If one challenge the Array, and it be found against him, he may not afterward challenge any of the Polls, without shewing cause presently; and this shall be tried presently.

4. No Challenge shall be admitted against the Triors appointed by the Court.

If the Plaintiff challenge ten, and the Defendant one, and the twelfth is sworn, because one cannot try alone, there shall be

added to him one challenged by the Plaintiff, and the other by the Defendant. When the Trial is to be had by two Counties, the manner of the Trial is worthy of observation, and apparent in our Books. If

the four Knights in the Writ of Right be challenged, they shall try themselves, and they shall choose the Grand Assise, and try the Challenges of the parties. If the cause

of Challenges touch the dishonour or discredit of the Juror, he shall not be examined upon his Oath; but in other cases he

shall be examined upon his Oath, to inform the Triors. If an Inquest be awarded by

default, the Defendant hath lost his Chal-

l

lenge;

Trial of Challenges.

Juror examined.

lence; but the Plaintiff may challenge for just cause, and that shall be examined and tried.

**View.**

Wheresoeber the Plaintiff is to recover per visum juratorum, there ought to be six of the Jury that have had the view, or known the Land in question so as he be able to put the Plaintiff in possession, if he recover.

**Challenges.**

In Proprietate probanda, and a Writ to inquire for Waste, the parties have been received to take their Challenges. But passing over many things touching this matter, I will conclude with the saying of Bracton. Plures autem aliae sunt causae recusandi juratores, de quibus ad praesens non recolo, sed quae jam enumeratae sunt, sufficient exempli causa. 1 Inst. 157, 158.

**Treat what.**

Treat doth signifie as taken out or withdrawn, and is applied to a Juror, that is withdrawn by consent, or removed and discharged by Challenge.

A Juror sick was withdrawn, and another sworn, Palmers Rep. 411.

**King.**

After Evidence given the King cannot draw a Juror, but before he may; but after Evidence on his prayer the Court may discharge the Jury, Keeble 2 part, 506.

**Challenge lost.**

If the Defendant do not appear at the Trial when he is called, he loseth his Challenge to the Jurors, although he doth afterwards appear.

**A wrong name**

'Tis a good Challenge to a Juror to say he is returned by another Name in the Pannel.

A Juror appeared and said he had no Freehold. No Freehold.  
 and prayed that he might not  
 serve, yet the Judge would not spare him;  
 for he may have an Action against the  
 Sheriff for returning him, Rolls 2 part,  
 Reports 483.

The Challenge pro defectu Hundred.  
 must be written in Parchment, and the  
 Council must arraign it in French, upon which  
 the Defendant may take Issue or demur. The  
 Clerk or Associate in Court must call the  
 jury over, and ask if they have any Lands  
 within the Hundred, or had at the time of  
 the Array of the Pannel, and whether they  
 dwell, or did dwell, in the same. And upon  
 examination if it appear clearly, that they  
 have no Lands or Tenements, nor dwell  
 in the Hundred; then the Clerk is to mark  
 them by the side of every of their Names  
 thus [præter Hundred.] but if he find there  
 two Hundredors, he is to resort back to  
 the præter Hundred. and swear them in or  
 out. So that you see the Trial whether  
 Hundredors or not, is determined by the  
 Courts examination by the Poll severally.  
 But if the Council demur, and the other  
 be joyn in Demurrer, the Judge of Assises  
 may affirm the Challenge, and over-rule  
 the Demurrer, or allow the Demurrer good,  
 and proceed to the Trial of the Cause; or if  
 the Judge doubt, it may be determined in  
 Bank, but this is great delay. If the Chal-  
 lenge be adjudged good, the Court awards,  
 que le pannel il soit casé.

In Cities, Corporations, Burroughs and Towns, and Counties, this Challenge cannot be.

Hundredors.

At Common Law there ought to have been four Hundredors returned and appeared in all Actions pro meliori noticia causa in controversia, for vicini vicinorum facta scire presumuntur. But by the Statute 35 H. 8. cap. 6. six are to be returned and appear. But since by the Statute 27 Eliz. cap. 6. if two Hundredors be returned and appear, it is sufficient in all personal Actions: But in real Actions there must be six, or else Remanet pro defectu Jur.

Note, In an Information of Forgery to be tried at Bar upon the Atorney Generals motion, that the Defendant might challenge for want of Hundredors; it was denied him, Keebles 3 part, 740.

The Court shall appoint two Triors to a Challenge to the Pall, and if they find two indifferent, the first Triors shall be discharged, and the two that are found indifferent, being sworn to try the first shall also be sworn to try the rest of the Fellows.

At Common Law there used to be returned 24 upon the Venire, and afterwards Habeas corpora with a Decem Tales, and if full Jury did not appear or were challenged then a Distingas with an Octo Tales, and so to the Duo Tales, if there were not full Jury. And this was the course until the Statute 35 H. 8. which gives the Tales de circumstantibus at the Assizes, &c. and by the Stat. 5 Phil. & Mar. cap. 7. where the King, Queen or Informer, &c. are parties.

A Challenge may be taken to those of the Tales de circumstantibus.

Tales de circumstantibus may be in the case of Aliens.

By the Statute 33 Ed. 1. The King and those who prosecute for him, must shew their cause of Challenge, as betwixt party and party, and left to the discretion of the Justices.

The King or any one authorized for him may release his Challenge. Where the party may challenge, the King may challenge.

'Tis no Challenge to say, the Juror is the Kings Tenant, or that he is favourable to the King; but 'tis good to say, the Sheriff or Juror bears grudge or malice to the Defendant where the King is party. If the Juror hath any Freehold 'tis sufficient, although not to 40 s. a year: For the Statute which enjoins that, speaks only betwixt party and party.

The first who challenges, be he Plaintiff or Defendant, shall have the preference and advantage of his Challenge. If a Juror be once challenged and withdrawn upon the principal; he cannot serve upon the Tales, if he doth 'tis Error, and Judgment may be stayed; And so if he be challenged, and a Jury remain pro defect. Juratorum, if he be sworn upon a new Distringas, 'tis Error, not helped by any Statute of Jeofails, and a mistrial, and a Venire facias de novo may be awarded, Cro. El. f. 429. Whitbys Case.

Elisors may be sworn in some cases to return and impanel all Juries, as should upon any Venire facias, Habeas corpora or Distringas Jur. come to their Hands impartially, indifferently and without favour or affection, nor at the denomination of any person.

The Record of Attainder, Conviction, Communication, Outlawry, &c. or a Copy thereof ought to be produced to prove the cause of challenge thereupon.

Where Bodies Politick or Corporate are concerned, a Challenge may be taken which arises from the individuals, as Brother to one of the Prebendaries, is a good Challenge where the Dean and Chapter are parties &c. Hob. 87. So a Parishioner, where the Right of the Church comes in question as the Suit of the Parson, 17 Aff. 15.

In High-Treason the Prisoner may peremptorily challenge to the number of 35 which is under the number of 3 Juries, but in Petite Treason, Murder or Felony the number is reduced to 20. The Prisoner may challenge any that are Witnesses against him.

Where the King is party the Defendant must shew the cause of his Challenge instantly.

After a Challenge for cause, the Prisoner may challenge the same person peremptorily.

Grand Jury.

One of the Petty Jury was challenged because he had been of the Grand Jury, and found the Bill, Sinderfin 244. 'Tis a good Challenge.

## C A P. X.

Of what Things a Jury may inquire ;  
when of Spiritual ; when of Things  
done in another County, or in an-  
other Kingdom ; when of Estopples,  
and when not ; when of a Mans  
Intent, &c.

**T**HE next Words in the Writ, which See more of  
have not yet been taken notice of, are this matter,  
se, Per quos rei veritas melius sciri poterit ; *cap. 13.*  
this is the chief end of their meeting to-  
gether : No Court can give a right Judge *Ex facto Jus*  
ment, unless the truth of the Fact be cer- *oritur.*  
only known ; and to find out this Truth,  
way is like to this of Juries ; for they do  
only go upon their own knowledge,  
ough they are Neighbours to the place  
ere the question is moved, and so are  
sumed to have a better knowledge of  
Fact, than any others ; for vicinus facta  
ni præsuntur scire ; But lest this pre-  
sumption should fail, the Law allows other  
vidence to be given to them, by which they  
y more certainly and confidently give  
their Verdict of the Issue, which is meant  
by this word Rei.

And here, it will not be amiss to give you  
a brief description, de quibus rebus, what the  
Request may inquire of, and find.

Of the Law.

Wherefore, though it be true, that a Jury shall not be charged, nor meddle with a matter of Law; and if they do, and find it, their Verdict as to this shall be void; yet daily experience (as well as Littleton, Sect. 368, tells us, that they may take upon them the knowledge of the Law, and give a general Verdict; though to find the Special Matter is the safest way for them, because, if they mistake the Law, they run into the danger of an Attaint.

In the Case of Manby and Scot, adj. Trin. 13 Car.2. B.R. one question was if the Verdict was well found, in an Action of the case against the Husband for Wares bought by the Wife; the Verdict finding, that the Wares were necessaries, and according to the Degree, whereas (as was objected) they ought to have found the Degree of the party and the value of the Wares and left it to the Court to judge.

But it was answered and resolved that the Court, i. e. the Judge before whom 'tis tried informs the Jury of the Matter of Law, and accordingly they find, and so it belongs to this Court.

Broughton a Reader of the Temple brought a Bill by Quo minus in the Chequer against Prince for maintaining a Suit against the Stat. &c. Prince pleads that he was admitted in the Inner-Temple, and Student for many years there, that he was Confiliarius in Lege eruditus, and took his Fæ in the cause. B. replied, de Injuria sua propria absque hoc quod in lege eruditus, &c. & hoc petit &c. & defendens similiter.

It was moved that the Defendant should demur to the Replication. Atkinson excepts to the Traverse and Conclusion; for it cannot be tryed by a Jury; for (says he) matters in Law be to be tryed by the Judges, a fortiori, the learning of the Law ought to be tryed by them.

Per Manwood Chief Baron, It shall be tryed by the Country. 3 Leo. 237. Broughton vers. Prince; which Case is cited 3 Cro. 728. to be otherwise ruled; yet it was allowed here a good Issue, whether a Parson of a Parish could speak Welsh.

Hut. 20, 21. Whether a plaint was levied according to the custom, was tryed by a Jury who are directed by the Court, as to the plaint, and whether it were pursuant to the custom, and are to find according to such directions.

In many Cases, the Jury are to enquire Of a Mans intent. of the knowledge and intent of a Man, as

where the Nar. is, that the Defendant kept a Dog which killed the Plaintiffs Sheep, sciens canem suum ad mordendos oves consuevit; though sciens be not traversable, yet the Jury upon Evidence must enquire of it.

b. 4. 18.

In some Cases, a Jury may try and find Of Spiritual things. a Spiritual thing, as a Divorce, Patrimony,

and must take notice thereof, upon pain of Attaint. li. 4. 29. lib. 9. lib. 7. 43. vide lib. 4. cap 2.

The Jury may find Bastardy, but it was Bastard. pleaded it must be tryed by Certificate.

So they may find a Divorce, for it is Divorce, not matter of Record, but a matter in fact.

The

In Trespals *Quare Causum fregit*, in the County of D. where the Trespals was committed in the County of S. upon Not Guilty, if the Jury find the Defendant guilty in the County of S. their Verdict is void. But if they find him Guilty generally, an Attaint lyeth. *Finch. 400.* Because this Trespals is local; and what is local cannot be inquired of by men of another County, for they can have no consens of it.

The Jurors of one County, may find any transitory thing done in another County; nay some times they must find local things in another County; as if the

Of things done in another County or Country. *Vide cap. 8.*

Rolls tit. Tryal f. 571, 624.

Heir pleads *riens per discent*, and the Plaintiff replies, *Assets in a Parish and Ward* within London, the Jury may find *Assets* in any County; the same Case against an Executor, who pleads *plene administravit*; the Jury may likewise find *Assets* in any part of the World. And the Reason is, because the place is only named for necessity of Tryal. But where the place is part of the Issue, it is otherwise. And therefore if I promise in one place to do a thing in another, and Issue is upon the breach, the Jury ought to come from the place of the breach. But if I promise in London, to do a thing at Burdeaux in France, and Issue upon the breach, yet this shall be tryed in London for necessity, because otherwise it would want Tryal, the Jury must enquire of the breach at Burdeaux. But if I promise in France to do a thing in France, so that both Contract and Performance is beyond Sea, this wants Tryal in our Law. Lib. 6. 47. Lib. 7. 23, 26, 27.

In the Case of Drake and Beere. Trin. 15 Car. 2. B. R. this difference was agreed by the Court, viz. That a Jury in an Inferiour Court may inquire of things out of the Jurisdiction,

Jurisdiction, if they be but for increase of Damages, as is 1 Cro. 571. Ireland versus Jackwel; but if they enquire of any thing suable out of that Jurisdiction, it is naught, Cro. 101. 2 Cro. 503.

Error was brought to Reverse a Judgment given in the Palace Court, in Indebitat. for that the Defendant was indebted to the Plaintiff Infra Jurisdictionem, for Purloining of a Child, not saying the Purloining was Infra Jurisdictionem.

Jurisdiction of Courts.

Wadh. Windham Justice, held it good, for that it is a Debt every where, and not like a Debt that ariseth by matter collateral: but Twisden Justice doubted. Whitehead versus Brown. Pasch. 15 Car. 2. B. R.

Vide Sanders's Report, 1 part 73. Peacock against Bell and Kendal. The Plaintiff desired the Defendant Infra Jurisdictionem inhabitatus fuisset to the Plaintiff in 391. pro diversis Merchandizis per quer. eidem Defendenti in tempus illud vendit. & deliberat. Held naught in an Inferiour Court, for not saying ibidem vendit. &c. but good in a Superior Court, and in the County Palatine of Durham, for that is an Original and Superior Court.

Inferior Courts.

The Jury may find Estoppels, as the taking of a Lease of a Man's own Land, by deed indented, or the delivery of a Deed before the Date, as in Debt by an Administrator, upon a Bond dated 4 Aprilis, 24 Eliz. The Defendant pleaded that the Indenture dyed before the date of the Obligation, and issint nient son fait, upon which they were Issue, and adjudged that the Jury might find

Estoppels.

When the Estoppel is found, the Court may judge according to the especial matter.

find that the Bond was delivered the third of April, because they are sworn *ad veritatem dicendum*; though the parties are estopped to plead a Deed was delivered before the date, but they may plead a delivery after the date, because it shall never be intended that a Deed was delivered before the date, but after may.

**Estoppels.**

But if the Estoppel or Admittance be within the same Record, in which Issue is joyned, then the Jurors cannot find any thing contrary to this, which the parties have affirmed, and admitted of Record, though it be not true, for the Court may give Judgment upon matters confessed by the parties; and the Jurors are not to be charged with any such thing, but only with such in which the parties vary. Lib. 2. 4. Lib. 4. 53. Co. Li. 227.

**Decree.**

A Decree in Chancery, shall be tryed by Jury, and not by it self; for it is not a Record, but a Decree Recorded. The Chancery, as it is a Court of Equity, is not a Court of Record, but touching things agitated in the Petty-Bag Office, it is a Court of Record.

**Exemplification.**

Exemplification of a Decree in Chancery, which has Bill and Answer, allows good Evidence. Keebles 1 part 21. Dads &c.

**Records not shewed.**

The Jury may find Deds or matters of Record, if they will, though not shewed in Evidence. Finch 400. They may inquire of things done before the memory of Man. Lib. 9. 34.

The Jury in many Cases may find matters in a Foreign County, Conditions, Records, Releases, &c. As in Battery of the Plaintiffs Servant in one County and loss of Service in another County, this Damage in the other County may be inquired of by the Jury of the County where the Battery is laid. The like of Assets because Transitory, otherwise of a local Trespals, &c.

Nul tiel Record is not to be tryed by a Jury, but upon the general Issue, &c. they may find a Record.

The Jury may find a Warranty, being given in Evidence, though it be not pleaded: nay, the Jury may find that which cannot be pleaded; as in Trespals, upon not guilty; The Jury may find that the Defendant leased Lands for Life, upon Condition, and entered for the Condition broken; though this cannot be pleaded without Deed, yet the Jury may find it. Lit. Sect. 366.

Where a collateral Warranty binds, this may well be given in Evidence: for although it doth not give a right, yet in Law this shall bar and bind a Right. Lib. 10. 97.

But this matter comes more properly under the Title Evidence; wherefore we will proceed to that.

See also in Chap. 13.

## C A P. XI.

## Evidence and Witnesses.

Evidence.

**E**vidence, Evidentia: This Word in legal understanding (saith Coke 1 Inst. 283.) doth not only contain matters of Record, as Letters Patents, Fines, Recoveries, Inrolments, and the like, and Writings under Seal; as Charters and Deeds, and other Writings without Seal; as Court-Rolls, Accounts, and the like, which are called Evidences, Instrumenta. But in a larger sense, it containeth also Testimonia, the Testimony of Witnesses, and other proofs to be produced and given to a Jury for finding of any Issue joyned between the Parties: and it is called Evidence, because thereby the point in Issue is to be made evident to the Jury: Probationes debent esse evidentes (id est) perspicue & facile intelligi.

Presumption.

And this Evidence (with Bracton) we may term probatio duplex, viz. viva, as Witnesses, viva voce; and Mortua, as by Deeds, Writings and Instruments; and Violent præsumptio, in many Cases, is plena probatio, and therefore if all the Witnesses to a Deed be dead, then the Deed shall receive credit per collationem sigillorum scripturæ, &c. but especially if there hath been a continual and quiet possession; which is a violent presumption. 1 Inst. 6. for no Man can keep his Witnesses alive.

If a thing be generally referred to proof, Proof.  
 it shall be intended proof by Jury; but if  
 in other manner of proof be agreed upon, that  
 shall take away the proof which the Law  
 generally intends by Jury: Hob. 127. As  
 if I promise to pay what I may prove B.  
 borrowed; this may be proved in the same  
 manner brought upon the promise. Vide Rolls  
 Tryal 594, 595.

In Felonies, &c. the persons that give  
 evidence for the Prisoner against the King  
 are not sworn, but see Siderfin 211.

B. was Indicted for striking F. in West- Indictments.  
 minster Hall, and the Witnesses that gave  
 evidence for B. were admitted to be sworn.  
 And so the Defendants Witnesses in Ap-  
 peal of Murder. 325. And the Court would  
 not allow Evidence upon Oath, given upon  
 an Indictment, although the Witness was  
 sworn; nor is Evidence upon the Indictment  
 in Trespass, Evidence upon an Action of  
 Trespass, ibid.

Upon Indictments and Informations con-  
 cerning criminal Offences, as against a Jus-  
 tice for compounding of Recognizances, &c.  
 upon motion the Court will order the  
 Prosecutor to give particular instances that  
 the Defendant may know what to defend.  
 See 2 part. 220.

A Jew being a Witness is sworn on the  
 Testament, and Perjury upon the Sta-  
 tute 5 Eliz. cap. 9: may be assigned upon  
 Oath: so if it be taken on the Common  
 Prayer Book, that hath the Epistles and  
 Gospel. Keebles 2 part 314. Hill. 19, 20 Car. 2.  
 B. R.

Open

Witnesses.

Men that are so branded with Infamy that they cannot be Jurozs, (for which be before who may be Jurozs) cannot be Witnesses; yet per Glyn Chief Justice and Nedigate Justice, Mich. 1657. B. R. Conviction of common Barretry hinders not from being a Witness; but Maynard, Serjeant, is strongly against it.

At Lent Assises, Suffolk, 1657. St. Job Chief Justice C. B. would not allow one who had been whipped for Petty Larceny, to be a Witness; but Earl Serjeant said, they ought to be stigmatici that are disabled from being Witnesses: Yet per Roll Chief Justice, one burnt in the Hand for Felony may be a Witness; for he is in capacity to purchase Lands, and his fault is purged by his punishment. Stiles 388.

Who may be  
Witnesses.

The Wife cannot be a Witness for or against her Husband. 1 Inst. 6. that is, in the case of a common person, between party and party; but between the King and the party on an Indictment she may, although it concerns the Feme her self, as in the Lord Audley's Case, Hen. 116. So she may have the Peace against her Husband.

In an Indictment prosecuted by the Husband, for seducing away his Wife, and keeping her some time in Adultery. The Wife was admitted to be a Witness against the Defendant, Coram Judice, Windham Lent Assises at Aylesbury, and the Defendant was found guilty. She may be a Witness to prove a Cheat upon her and her Husband. Siderfin 431.

And so it was resolved in John Brown's Case, Trin. 25 Car. 2. B. R. on the Statute 3 H. 7. cap. 2. vid. 1 Cro. 492.

The King cannot be a Witness by his letters under his Signet Manual: One attainted of Piracy cannot be a Witness to prove another guilty. If he accused another before he was attainted, and afterwards confesses he wronged him, this confession shall be rejected, because he is attainted. A Woman cannot be a Witness to prove a Man to be a Willain. Co. Lit. 6. 8.

Neither can the party to the usurious contract, be a Witness against the Usurer, nor an Information upon the Statute of Usury.

But Kinsmen never so near, Tenants, Servants, Masters, Counsellors, and Attorneys, &c. may be Witnesses. A Counsellor

may be a Witness to the Agreement, &c. as to the validity of an Assurance, nor to the Counsel he gave. March, Rep. 43. If a

Witness being served with Process, and having money sufficient to bear his charges, (unless, if he accept it) do not appear to give

testimony, he forfeits 10 l. to the party aggrieved, and must recompence his damages. 5 Eliz. 9. If a Witness commit wil-

ful perjury, he loseth 20 l. shall be imprisoned six Months without Bail, stand in the stocks, and be disabled to be a Witness; so

shall the suborner, who procures the Perjury. 5 Eliz. 9.

A party robbed is allowed a good Witness in his own Action against the Hundred, for he is not bound, nay is to be blamed, to tell any one what charge he carries with him;

¶

and

But an Attorney cannot be a Witness against his Client for matters subsequent to his being employed.

and if he should not testifie, the Law would be often fruitless for want of Evidence, or else moze Robberies committed by the parties discovering his Pony.

In the Case of Brereton and Tatam, Mich. 1656. B. R. Glyn Chief Justice, cited the Lord Chandoi's Case in this Court, where one Gates an Executoz was produced to prove the Will, as a Witness, to which he (as Counsel) excepted, because of his Executorship. It was answered that he had fully administered: He replied, that Assets might afterward come to his hand; but the Court resolved that it would not be presumed to hear his Testimony, which was allowed in the principal Case, being in Ejectment.

It's no good exception to a Witness that he hath common pur cause of Vicinage in the Lands in question, because its but an excuse of Trespasse, and no interest. Clapham's Case. Mich. 1657. B. R.

The same of common of Shacke.

If Obligee devises the Debt to the Obligor, and his Executors deliver up the Bond in satisfaction of the Legacy which is cancelled, and after the validity of the Will is questioned, viz. whether the Testator was compos, &c. the Obligor is a good Witness for the Will, because by the cancelling of the Bond his Debt was discharged. See Contr. in Case of Mortgage, for though the Deed be cancelled, if it be no good Will, he must pay the Pony. Goodman vers. Tumbervil. Mich. 1657. B. R.

An Action was brought by the Corporation of the Weavers of Norwich, for a Penality against

against a Weaver for working at his Trade in Harbest time, contrary to an Ordinance by them made. And Atkins Justice allowed one of the Corporation to be a Witness, though one moiety of the Penalty was due to the Corporation. Lent Assise 1657.

In a Tryal at Bar, where an Estate for Life is limited to J. S. remainder to the poor of the Parish of Greenwich by Will; the Inhabitants of Greenwich, were allowed to be Witnesses to prove the Will. Townsend and Roan, Mich. 1658. B. R. Siderfin 2 part 109.

An Action of Debt was brought, Summer Assises Suff. 1669. by the Town of Ipswich, for 50 l. a Fine set upon one chosen Common Council-man (called their prime Constable) for refusing to renounce the Covenant, &c. And the Town-Clerk (though a Free-man) was allowed a Witness to prove Election, Refusal, &c. and the Fine set, which is for necessity, for that none other are ought to be present at those Acts. Rainsford Justice.

Per Hale Chief Justice, Norfolk Summer Assises 1668. A Freemen of Lynn is not an allowable Witness to prove the Custom of Foreign bought and Foreign sold in that Town, Harwich versus Twels.

As to Witnesses Priviledges.

One was Subpena'd ad testificandum, and payed a Priviledge from being Arrested, which was granted, and per Cur. it will supersede an Arrest upon mean Process, but not upon an Execution; yet the Sheriff in that case may be committed for his Contempt. Pen. Nevil's Case, Mich. 15 Car. 2. B. R.

## Detaining of Witnesses :

Sir Jo. Jackson was Convict of an In-  
formation for preventing of Evidence to be  
given on an Indictment of Perjury against  
Fenwick and Holt, who had been Witnesses  
for Sir J. J. he arrested some Witnesses,  
and gave mony to others, and so they were  
acquitted : He was fined one thousand Marks,  
one Months Imprisonment, Behaviour for  
twelve Months. Hill. 1663. B. R.

Proof.

Proofs to determine matter of Fact, and  
to be offered to a Judge and Jury, are of two  
sorts. First Living, as by Witnesses, and  
to a Jury one Witness is sufficient. And  
Dead, as matters of Record, as Letters  
Patents, Fines, Recoveries, Inrolments,  
&c. Writings sealed and delivered; as  
Feoffments, Leases, Releases, &c. And  
without Seal, as Court-Rolls, Accounts  
&c. And if the Case be between the King  
and a Prisoner, he is first to say what  
he can for himself, and then all that can  
say any thing against him are to be heard  
upon Oath, and then others may be heard  
for him, but not upon Oath : and according  
to this Evidence on both sides, or without  
any Evidence at all, the Jury are to give  
their Verdict, according to their knowledge  
and Oaths.

Such persons as are Infamous, as  
persons attainted of Felony, or of a false  
Verdict, or of a Conspiracy, or of Perjury  
or of Forgery, upon the Statute of 5 Ed.  
cap. 14. and not upon the Statute of 1 H.  
3. and such as have had Judgment to lose  
their Cars, or stand on the Pillory or Turn-  
key

hrel, or have been stigmatized or branded, and Infidels, Men not of sound Memory, or not of discretion, or such as are interested in the Cause, or have benefit, are not competent Witnesses. Co. 1. Inst. 6. but we see Jews are daily admitted Witnesses.

The Jury are obliged to take cognizance of what is sufficient Evidence, on pain of an Attaint, Evidence.

An account given to and allowed by the Ordinary, is not good Evidence; nor a *Plene administravit.* agree by a Herald at Arms, to prove an Heir, *Pedigree.* but it must be proved by Deeds, Records, or Witnesses.

In Debt against an Executor, suggesting Devastavit, any Evidence that proves Assets, is not sufficient, but an actual Devastavit must be proved, for now the party is chargable in his own right, Keeble 2 part, 676. *Devastavit.*

If the Issue be a Recognizance or not, a Recognizance with a Defeazance is good Evidence. Flo. 14. So of an Agreement, *Recognisance.* Special Agreement will prove it. Flo. 8. *Agreement.*

A Licence to alien Land, or a pardon for alienation of Land, was held by a common presumption, to be a good proof that the Land was held in capite. *Tenure in Capite.*

A thing which is concluded in the Ecclesiastical Court, which doth concern Lands, is not to be given in Evidence; for the Courts of Common Law are not to be guided by their proceedings. *Ecclesiastical proceedings.*

Ancient Deeds may be given in Evidence, Ancient although the execution of them cannot be proved. *Deeds.*

An Ancient Deed found in the Archives of the

Vicar.

Endowment.

Dean and Chapter, given in Evidence to prove the Endowment of the Vicar, though it appeared never to be sealed or delivered. Keeble 2 part, 126.

Payment time out of mind, is good Evidence of an Endowment. 729.

Copy of a Record.

He that takes out a Copy of part of a Record, must at least take out so much as concerns the matter in question, or else the Court will not permit it to be read.

Outlawry.

If one produce a Lease made upon an Outlawry, in Evidence to a Jury to prove a Title, he must also produce the Outlawry itself.

Feoffment.

To prove a Feoffment, a Deed of Feoffment is shewed, but no Livery is Indorsed, if possession has gone with the Deed, it is good Evidence. Rolls Rep. 1 part, 132.

Proviso.

Upon Not Guilty to an Information upon a penal Law, a Proviso to excuse him may be given in Evidence. Jones Rep. 320.

Non decimando.

If a Man prescribe in a non decimando generally, he cannot give a Bull in Evidence. Palmers Rep. 38.

Deed.

A Deed with the Seals torn off was admitted to declare Uses. Palmers Rep. 403, 405.

Records.

Records prove themselves, and cannot be proved by Witnesses; but Copies of them must, and are good Evidence and so may any thing done in the County-Court, Court-Baron, or Hundred-Court, &c. be proved by Witnesses.

A Copy of a Conviction upon an Indictment of Trespass, &c. shall not be admitted evidence singly by it self, in an Action of Trespass, &c. but with Evidence it shall.

A Fine or Common Recovery, may be given in Evidence, though it be not under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery; and the part indented is the usual Evidence that there is such a Fine, though they which saw the Fine, are also good Evidence, Plow. 410. Stiles 22.

When a Writ out of a Court of Record is only inducement to an Action, the taking out the Writ may be proved without Copy of it, for it is not of Record till it be returned. And so I think it may to prove the Point in Action, by Witnesses or Notes of it in a Book of Entries, &c.

Depositions in the Ecclesiastical Court cannot be given in Evidence, though parties be dead. March 120. A Defendants Answer in an English Court, is good Evidence against him, but not against others, Godbolt 326. Where the Evidence proves the effect and substance of the Issue, it is good. By Order of Court the Depositions taken of a Sick Witness may be given in Evidence.

I cannot make use of Depositions in a Cause wherein I was not a Party, for as they cannot be read against me, no more can they be read for me, because I am not bound by them, nor in a capacity of examining Witnesses in it, or preferring Interrogatories. And 'tis not like the Case of an Ejectment brought by a Reversioner, or Debt upon the Statute of Ed. 6. brought by a Proprietor of Tithes, after a Verdict at Law, for the Lessee or the present

proprietor, the Reversioner of the Lands or Tithes shall have advantage of the Verdict, and give it in Evidence; and the reasons are, because they cannot be immediate Parties to the Action or Suit, for that must be prosecuted by the Lessee or present Tenant, and they may give in Evidence as well as the Plaintiff himself; but it is otherwise in case of Depositions, for there only Parties to the Suit can examine or interrogate; likewise the Reversioner or Seignior, (whose Tenants were only Parties in the former Suit) might themselves have been made Parties in a Suit in Equity. The Countess of Pembroke's Case, Hardres Rep. 472.

The Depositions of a Witness taken before answer, to preserve his Testimony who dieth after Answer, shall not be given in Evidence, although he continued so till that he could not be examined after Answer. Hardres Rep. 315.

Depositions in Chancery of Witnesses that are dead may be read at the Assizes betwixt the same Parties, proving the Bill and Answer.

See Keeble 2 part 31. An old Exemplification of Depositions in Chancery given in Evidence, although the Bill and Answer were not in it, for about forty years since 'twas not usual to insert Bill and Answer.

The Answer of one Defendant is not Evidence against another Defendant.

If Witnesses are examined de bene esse before Answer upon a Contempt, such Depositions cannot be made use of in any other Court.

court, but in the Court only where they were taken; the reason seems to be, because there was no Issue joyned, so as there could be a legal Examination, and they were only taken to be read in the Court in which they were taken, upon Contempt to that particular Court. Harles Rep. 332.

Summer Assises 1683. before Wiew in *Bevis against*  
 Escape upon a Judgment, and Ca. sa. in the *Holloway.*  
 Court of the Dean and Chapter of Peterborough being an Inferior Court of Pleas, the Plaintiff was nonsuited because he had not a Copy of the Plaint nor Judgment, but only the short Notes of the Book of the Court. Aliter in Court Baron, &c.

Upon plene administravit, if it be proved *Assets.*  
 that the Executor hath Goods of the Testator in his Hands, he may give in Evidence, that he hath paid of his own Money for the Testator, to the value of these Goods, Co. lit. 283. Dyer 2.

The Plaintiff may say, he sold the Land by the appointment of the Testator, 3 H. 3.

So if a Lease be pleaded, a Lease upon Lease. Condition is good Evidence, 1 H. 8. 20. because the Genus comprehends the Species. So of a Feoffment pleaded, a Feoffment upon Condition, or a Fine which is a Feoffment of Record, is good Evidence, 44 E. 39. A special Agreement is evidence for an Agreement, Plow. 8.

But if a Feoffment be pleaded in *Fee*, Feoffment.  
 upon Issue non feoffavit modo & forma, a Feoffment upon Condition is no Evidence, because

because it doth not answer the Issue; wheresoever Evidence is contrary to the Issue, and doth not maintain it, the Evidence is not good, 11 H. 4. 3. Feoffments. A Grant in Reversion is no Evidence, but a Lease and Release is, 20 H. 7. 5. If the Indorsement be of a Libery by Attozney, the Letter of Attozney must be shewed.

Assumpsit.

Upon an Assumpsit to the Husband, an Assumpsit to the Wife and his Agræment is good Evidence, 27 H. 8. 29. Upon non Assumpsit to a special promise, payment is no Evidence per thre Judges.

Challenge.

An Challenge to the Array, because made at the denomination of the Sheriffs Clerk is good Evidence at his Bailiffs denomination, is good, because favourably made is the substance, 38 H. 6. 9.

Assets.

If the Issue be in a Suit against an Executor, Administrator or Heir, Assets in London; to prove Assets in another place is sufficient, Li. 6. 47. Dyer 271.

Accompt.

Accompt pleaded before two; Accompt before one is good Evidence, Hob. 55. because the Accompt is the substance.

What Evidence upon the General Issues.

Upon the General Issue the Defendant may give any thing in Evidence, which proves the Plaintiff hath no cause of Action, or which doth intitle the Defendant to the thing in question.

Detinue.

But if he hath cause of justification or excuse, it must be pleaded; wherefore upon non detinet in detinue, the Defendant may give in Evidence a Gift from the Plaintiff; for that proveth that he doth not detain the Plaintiffs Goods; but he cannot give in Evidence

Evidence that the Goods were pawned to him for Money, and that it is not paid, but he must plead it, 1 Inst. 283. For the property is in the Pledger.

Upon Not Guilty, in Battery son assault In Battery. demesne, is no Evidence; for thereby the battery is confessed, Ib. Neither is Not guilty good Evidence upon son assault demesne.

Upon Not Guilty, in Trespass, Insufficiency of the Plaintiffs Wounds, or to justify a Kent-Charge, Common, Licence, on assault demesne, or the like, is no good Evidence, Ib. But to prove a Trespass before after the day laid in the Declaration is good to maintain the Action, 1 Inst. 283.

So upon the Plea, nul Waste fait, in an Action of Waste, he may give in Evidence, any thing that proveth it no Waste, as by Tempest, by Lightning, by Enemies, &c. But he cannot give in Evidence any justifiable Waste, as to repair the House, or the like; nor a reparation of the Waste, before the Action brought, Ib. For the rule is, That the Evidence must stand and agree with the Issue.

Upon non est factum 'tis no Evidence to show the Bond that was made upon an usurious Contract, or that the Sheriffs Name is mistaken, &c. in a Bail-Bond; or that the Bond is joyned or several, or delivered at another place; or that it is void by Statute. But it must be pleaded in Abatement, Ib. Job. 72.

Trespass.

Mistake of the day in an Appeal is not material upon Evidence.

Waste.

Non est factum

But to prove that the Seal was broke off, and put on again; or to prove a Release of the Dæd, delivered as an Escrow, this is good Evidence, Li. 5. 119. 11. 27. If 'twere done befoze the Action brought but if the Seal was broke off, &c. by chance after Issue joyned, the Jury may find it specially.

To prove the sealing and delivery of a Dæd, and not know the party that did it, is not good Evidence; but if he knows the party upon sight of him it is good enough Kelw. 59.

### Trover.

Upon Not Guilty, in Trover and Conversion, a Demand and denial of the Goods is good Evidence, and an actual taking is good Evidence of the Conversion; but when the Goods come to the Defendant by Trover, there must be an actual demand and denial, Plow. 14. li. 10. 57. Cro. 1 part, ubi pub. 495. Hob. 187. More 460. Abridge Rolls 5.

### Plene administravit.

But an Outlawry of the Testator is Evidence upon Plene administravit, Keeble 2 part, 745. Debt for Rent

Upon Plene administravit, the Executors cannot give a Judgment in Evidence, Kelw. 59. nor payment of Debts by Contract, is Debt brought upon an Obligation. A Copy pawned and redeemed with the Executors own Pony, is good Evidence; but a Recovery ought to be pleaded; upon nil debet, Debt for Rent, That the Lessor entered into part of the Land, is no good Evidence, Goldf. 81. But non demisit is, 9 H. 7. 3.

### Parco fracto.

Upon Not Guilty, in an Action upon the Statute de parco fracto, That the Plaintiff hath no Park, is good Evidence; 19 H. 8. 9.

So upon Not Guilty, in Trespas, in the Warren.  
 Plaintiffs Warren, Evidence that he hath  
 Warren is good, 10 H. 6. 17. Kitchin

119. A Shop-book no Evidence after a Year, Shop-books.  
 fac. cap. 12.

In Debt for Arrerages of an Accompt Accompt.  
 on Nil debet modo & forma; No Ac-  
 compt is good Evidence, 2 H. 6. 26. Upon  
 Not Guilty in Trespas, a Lease for years,  
 H. 8. 2. or that locus in quo, &c. is the Trespas.  
 ehold of another, 4 E. 3. 45. is good  
 Evidence; and so of a Gift of Goods;  
 upon this he cannot justifie his entry  
 on the Place by a Strangers Licence, or  
 command, Br. General Issue 81. because this  
 a Justification by way of Excuse; Nei-  
 er is a Lease at Will good Evidence in  
 this Case.

So upon Not Guilty, in Trespas for Not Guilty in  
 Goods, tis good Evidence that the Goods Trespas.  
 were a Strangers, 9 H. 6. 11. But that  
 they were a Strangers, and that he as  
 servant to the Stranger, or by his com-  
 mandment, took them from the Plaintiff,  
 not good, Br. General Issue 81. because  
 the Trespas is confessed. But that the  
 stranger gave them to the Defendant is  
 good, 9 H. 6. 11. In Trespas the Buttals  
 must be proved as they are laid.

If the Defendant plead payment to a Payment by  
 Bond or Will, and it appears the Debt Presumption.  
 very old, and it hath not been demand-  
 ed, nor any Use paid for many years,  
 Common Presumption is good Evidence,  
 that the Money is paid, and the Juries  
 use

use to find for the Defendants in such Cases.

Escape.

In Debt upon an Escape, if the Defendant plead nul Escape, he cannot give Evidence no Arrest.

Trespas another day.

If the Trespas were in truth done the 4th of May, and the Plaintiff alledgech the same to be done the 5th. of May, or the first of May, when no Trespas was done; yet if upon Evidence, it falleth out that the Trespas was done before the Action brought, it sufficeth, 1 Inst. 283.

And so in Indictments, 3 Inst. 230.

Deed.

*Keeble* 2 part, 546. Instances of a Copy not examined, allowed and disallowed in Evidence; but I think unless the Witness swear that he remembers the Contents of the Deed, and that they are as the Copy is, the Copy ought not to be allowed Evidence unless examined.

Executor.

'Tis dangerous to permit Evidence to be taken by Jury by Witnesses, that there was such a Deed, which they have seen or read, to prove the Deed by a Copy, because the Deed may be upon Condition, Limitation, or Power of Revocation; and if this should be permitted, the whole Reason of the Common Law, in shewing Deeds to the Court, would be subverted; for the Deed might be imperfect, and void, which the Witnesses could not perceive; yet in cases of extremity, as where the Deed was burned, or lost by some other notorizous Accident, the Judges may at their discretion, allow them to be proved by Witnesses, lib. 10. 92. and so of a Record.

In Case against an Executor; where the Testator was indebted to the Plaintiff, the Executor promised to pay the Debt, in consideration the Plaintiff would forbear to sue him; the Executor may give Evidence upon Non assumpsit, that there was no Debt, or that he had no Assets tempor

pro

omission is, for then there would be no Con-  
 sideration, li. 9. 94. William Banes Case upon  
 the Issue ne unques Executor to prove an Ad-  
 ministration granted to him, is good Evi-  
 dence, Dyer 305.

In Trover brought by an Executor, the Defendant pleaded ne unque Executor. The Defendant shall not give in Evidence that the Will was forged, because the Will is under the Seal of the Ordinary, to whose Examination it belongs, as to Goods; the Forgery of the Probate, or a Revocation, may be given in Evidence, because these things are in Affirmance of the Spiritual Proceedings, so of an Administration, that there are bona notabilia, may be given in Evidence, but not Non compos mentis, Siderfin 359. Keeble 2 part, 337.

*Ne unques Ex-  
 ecutor.  
 Spiritual  
 Courts.*

Evidence shall never be pleaded, but the Matter of Fact shall be pleaded, and if it be denied, the Evidence shall be given to the Jury, not to the Court, lib. 9. 9.

Evidence, that the Wife of every Copyholder, shall have the Land durante viduitate, will not maintain the Issue, that the Custom of a Mannor is, That she shall have the Land during her Life, after her husband's Death, because, though durante viduitate, imports an Estate for Life, yet Estate for life. Estate durante vita, is more large and beneficial, lib. 4. 30.

Things done before the Memory of Man in another County, or in another Kingdom, may be given in Evidence to a Jury, as Actions in another County, &c. More 47. Sa 4. 22. 9. 27, 28, & 34. li. 6. 46, 47.

*What may be  
 given in Evi-  
 dence.*

Upon

## Payment.

Upon Issue, payment at the day; payment before or after the day, is no Evidence. More 47. but upon Nil debet, it is good Evidence, because it proves the Issue.

## Covin.

Upon Issue, Assets or no Assets, or seised or not seised, if one give a Feoffment, &c. in Evidence, Covin may be given in Evidence, by the other, but not if the Issue be infeoffed or not infeoffed, for it is a Feoffment tiel quel, though made by Covin, li. 60. Hob. 72.

## Voluntary Conveyance.

A voluntary Conveyance is not fraudulent, because voluntary, but 'tis Evidence of Fraud against an after Purchaser bona fide; the Statute avoids such Deeds as are bona fide, and on Consideration if made with intentione to defraud Purchasers, therefore this Fraud must be found by the Jury, Keeble 1 part, 486.

## Doomesday-book.

The Book of Doomesday brought to Court, is good Evidence to prove the Land to be ancient Demesne, Hob. 188.

## Attaint.

In Attaint, the Plaintiff shall not give more Evidence, nor examine more Witnesses, than was before, but the Defendant may, Dyer 212.

## Court Rolls for Copy-holders.

Recoveries are some Evidence that the Manor bears an Intail of a Copyhold, but to shew that Remainders (after an Estate Tail spent) to be Injoyed is a better.

Copies of the Court Rolls, are the only Evidence for Copy-holders, for (as Littleton, Sect. 75. tells you) they are called Tenants by Copy of Court Roll, because they have no other Evidence, concerning their Tenements, but only the Copies of Court Rolls. But Cook explains the Text, and

ys, This is to be understood of Evidences  
of Alienation ; for a Release of a Right  
by Deed, a Copy-holder (that cometh in by  
way of admittance) may have, and that is  
sufficient to extinguish the Right of the  
Copy-holder which he that maketh the Re-  
lease had.

In Actions upon the Case, Trespas,  
Battery or False Imprisonment against any  
Justice of Peace, Mayor or Bailiff of City  
or Town Corporate, Headborough, Port-  
reeve, Constable, Tithingman, Collector  
of Subsidy or Fifteen, in any of his Ma-  
jesties Courts at Westminster, or elsewhere,  
concerning any thing done by any of them,  
by reason of any of their Offices aforesaid,  
or all other in their aid or assistance, or by  
their Commandment, &c. They may plead  
the General Issue, and give the Special Mat-  
ter of their Excuse or Justification in Evi-  
dence, 7 Jac. cap. 5.

Special Evi-  
dence upon  
the General  
Issue, by whom

General Acts of Parliament may be gi- Statutes:  
ven in Evidence, and need not be pleaded ;  
and so may General Pardons given by  
Parliament, if they be without Excepti-  
ons ; But commonly advantage of the Act  
given by the Act it self to the Offens- Pardons.  
er, without pleading it, as by the late  
(most truly so called) general Act of In-  
clemency, every Person thereby pardoned,  
may plead the General Issue, and give the  
Matter in Evidence, for his discharge : Which  
is the general, and which particular Statutes,  
see lib. 4. 76.

A private Act may be given in Evidence exemplified under the Great Seal, or a Copy of the Record; but a printed Copy is no Evidence unless it be proved; it ought to be pleaded, but the Jury may find it, Dyer 239.

## Trover.

Upon Not Guilty in Trover, the Defendant may give in Evidence, that the Goods were pawned to him for 10 l. That he distrained them for Rent, or Damage-feasant: That as Sheriff, he levied them upon Execution, or that he took them as Tithes severed, Cro. 1 part, 157. 3 part, 435. Hob. 187. A demand and denial of the Goods is Evidence of a Conversion.

If there be two Trespasses, and the Defendant pleads a Justification; if the Plaintiff replies, *de injuria sua propria*, &c. he cannot give in Evidence a Trespass at another time; But he should have replied, that at another time, in

the same day of his Count, the Defendant did the other Trespass &c. to which the Defendant may plead another Justification, but the Plaintiff cannot then plead a Trespass at another time, but must conclude *Sans tiel cause*, &c. *vide apres.*

If there be two Batteries between Plaintiff and Defendant, at divers times, the Plaintiff is bound to prove the Battery made the same day in the Declaration, and shall not be admitted to give another day in Evidence, as the Case may be: As in Battery the Defendant pleaded, *Son a fault deniefne*, and the Plaintiff replied *De injuria sua propria absque tali causa*, and in Evidence, the Defendant maintained that the Plaintiff beat him the day mentioned in the Declaration, and in the same place, which the Plaintiff perceiving, gave in Evidence, that the Battery was

made another day and place, to which the Defendant demurred, upon the difference foresaid. Brownlow 1 part, 233. 19 H. 6. 7. But upon not Guilty, it is otherwise, though there be never so many Waters between the Parties. Littleton, Sect. 35.

Prohibition for suing for Tythes in Bocking-Park in Essex, and surmised, that the lands were parcel of the Possessions of the Priory of Christs-Church in Canterbury, and the said Prior and his Predecessors had held it discharged of Tythes tempore dissolutionis, and pleaded the Statute of 31 H. 8. The Defendant pleads that the Prior and his Predecessors did not hold them discharged, and upon Issue joyned thereon, the Evidence was, That the Prior or his Predecessors, were out of mind, &c. never paid Tythes; that no cause was shewn, either by unity of possession, real Composition, or other cause shew it discharged: Cook said it was no Evidence, for it is a Prescription in non decimando. Curia contra; for a Spiritual Man may prescribe in non decimando, and by the Statute of 31 H. 8. he shall hold it discharged as the Prior held it; and if he held it discharged, non refert, by what means; and it shall be intended by lawful means, and the Jury afterwards found it for the Plaintiff. Cro. 3 part, 2, 6. Keeble 2 part, 5.

*A non decimando.*

*In nil debet;* upon the Statute for Tythes, a Lay person cannot give a non decimando in Evidence; so may the King, and any other spiritual persons. II. 2: B. of Winchester's Case.

Upon non assumpsit, in a general Indebitatus assumpsit, the Defendant may give in Evidence, payment at any time, before the action brought, but upon a special promise

*Indebitatus assumpsit.*

A Church-  
Book is no  
Evidence.  
*Brownlow*  
1 part 207.  
*Postea* 26.  
*Affise* pl. 4.

to pay Money, &c. it is otherwise, *Causa patet*; for in the first Case, if there be no Debt, the Law will infer no promise.

If a Church-Book, or any thing else be given in Evidence, which ought not to be allowed, the Court above cannot quash the Verdict, except it be certified and returned with the *Postea*. *Brownlow* 1 part, 207. But the Court may order a new Tryal, upon cause shewed, as for excessive Damages, &c.

The Court will not permit the Jury to carry any Writings out with them, but what are proved, and under Seal.

But here I recollect my self, and consider that this Chapter is of greatest use to our Circuit Practiser, and therefore I shall go no farther in scatter'd Instances, but digest my farther Collections into a Method more beneficial, which may be improved by any Practiser, as other matter shall occur.

Action of the  
Case.

*Quare defendes Crimen felonix ei imposuit*, &c. The Plaintiff cannot give in Evidence words only, but acts, as arresting, charging or conventing him before Justice of Peace for Felony. *Sanders versus Edwards*, Mich. 14 Car. 2. B. R.

If any Action arises on request, as in *Trover* or Special Promise, the Statute of Limitation goes only to the request. *Juy's Case*, Mich. 1652. C. B. 1 Cro. 139.

Declaration for Words spoken in the presence of A. B. and others, in Evidence it sufficeth that they were spoken in the presence of others only. *Winckfield and Coot*,  
Lent

Lent Assises Norfolk, 1662. per Hale Chief Baron.

In Indebitatus for carrying of Herrings; the Evidence was, he was a Porter at Yarmouth, and when Herring-Ships came home, he went (of his own head) and carried up to the Defendants House, with other Porters, so many Herrings; and good by Twisden Judge of Assise, Norf. Summer 1662. Jermin vers. Lucas.

In Action for hindring to sit in a Pew, claimed by prescription, repaired, &c. ought to be given in Evidence; and one may prescribe to sit in the uppermost Seat in a Pew. Buckston and Bateman, Mich. 14 Car. 2. B. R. Pew. Keeble 2 part, 342.

In Action for executing an Illegal Warrant, &c. It's good Evidence to prove the Justice of Peace acted as such, without shewing his Commission; so on the Statute of Hue and Cry. Constables Case. Norf. Lent Assises, per Hale Chief Baron.

Action for stopping up lights, &c. One had a piece of Ground and builds an House on part, and Leases it, then he sells the other part of the Ground to one who builds on it, and stops up the lights of the first House, the Lessee has a good Action. But if two owe two pieces of Ground, and one builds, the other may also build and stop up his lights. Palmer versus Fleisher, Mich. 15 Car. 2. B. R.

If a Master always gives his Servant Master. Pony to buy his Markets with, it is good Evidence to discharge the Master in an Action brought against him for Goods taken up

on Trust, by that Servant. Per Glyn Chief Justice, Mich. 1658. at Guild-Hall, Sir Tho. Rouses Case.

Master.

The Master declared, That the Defendant dug a Pit, and as he was driving his Horse, he fell in the Pit, &c. To prove the Servant drove the Horse doth not maintain the Declaration. Stiles 335.

A Water-course runs through my Ground to the Grounds of J. S. where is a Pit that time out of mind used to be filled with that water, I may stop the water in my Ground, and use it as I will, so I do not turn the course another way, but when I have done with it, let it fall into its own course. Per St. John Chief Justice, C. B. Suff. Summer Assises, 1657. Smart and Tystead.

Action for words, You forswore your self in your Answer in Chancery. Defendant justifies. Plaintiff replies, de injuria sua propria absque tali causa. Per Hale Summer Assise Suffolk, It's a good replication, and a small mistake in an Answer shall not convict of Perjury, for the Council may mistake of his Clerk.

Action for not scouring a Ditch, by which the water overflowed his Land, &c. and declare quod quidam Rivus run there, &c. Upon Evidence it appeared only a Land-flood, and good by name of Rivus, though it be dry great part of the year; and it was held the best pleading of the course of this River to put a place from whence it comes, and so to the Plaintiffs Land, without mentioning mean places by which it passes, which may be many.

many, and must be proved if laid, Per Whitfield 1641. York. Clayton 96.

Souldiers lying in an Inn fourteen days, are Guests within the Custom of England, Harland's Case, per Whitfield, 1647.

The Plaintiff in Action of the Case intitles himself by Prescription, to a Fold-course for Sheep upon all the Lands in such a Field on Michaelmas day, and so to Lady day, the Lands being unfown, and for that the Defendant put on Sheep, &c. before Michaelmas day and after, and thereby fed the Grounds, &c. the Plaintiff could not take to good feed, actio inde.

1. The Owner may put on Sheep and feed his own Grounds before Michaelmas, unless a Custom be to the contrary, which ought to be laid in the Declaration. Contra of a Stranger.

2. It appearing that part of the Lands, &c. had been the Lands of the Plaintiff, who was Lord of the Manor, and prescribed as such, and there being no exception of those Lands in the Prescription, the Plaintiff was non-suit; for as to those Lands the Prescription is gone by unity of Possession. Per Hale Chief Baron, Norfolk, Summer Assises, 1668. Branthwait versus Hunt.

#### Assumpsit.

In Indebitatus, Covenant to pay is no Evidence, 2 Cro. 505. For Money due for Rent by Specialty, or on Record. Hob. 284. Hutt. 35.

Baron and  
Feme.

But an Account stated for Rent and other things, is good Evidence.

Indebitatus ass. against Baron for necessities for his Wife, they must be according to his Estate, as well as degree. Sidertin 128. If she doth not cohabit with him the Action doth not lye. If the Goods bought by the Wife or Servant come to the use of the Husband, although this be no binding Evidence, yet this presumptive Evidence shall charge him.

Infaney.

He may forbid one or two, &c. to let her have Goods, but a general forbidding also is void. Keeble 2 part, 554.

Per Hales Chief Justice, deins Age may be given in Evidence on non assumpsit, in an Indebitatus assumpsit, Keebles 2 part, 851. Painter and Bowman's Case.

In Indebitat. not for Money, &c. delivery of Corn or other matter in satisfaction, is good Evidence. Contra in a special Action of the Case on Assumpsit. Vide Keeble 3 part, 18.

Indebitatus lyes for Money won at Dice, Wiche's Case, Hill. 14, 15 Car. 2. B. R.

If a promise be made to pay at a day certain, and the day is past, the Plaintiff may declare to pay on request: so if he declare on payment at a day certain, and give in Evidence a promise on request, i. e. when it is created on account which gives the duty, for there the time is ex abundanti; but where the Action is founded on the Contract, otherwise, for there the Evidence must pursue the Contract. Hill. 1650. B. R. Child's Case.

Pro

Promise to restore a Horse hired for a Journey, if the Horse dies in the Journey without the Riders default, his promise binds not. Lisle's Case, cited in Matrauer's Case, Trin. 1651. B. R.

One brings an Assumpsit for 20 l. and gives in Evidence a promise if two would surrender to pay them 20 l. apiece, good. Mich. 1655. B. R. Thomas and Gerey.

Indebit. for 50 l. brought by Edgar against Chetham Clerk. The Evidence was, T. was indebted to Edgar in 50 l. Chetham desires Edgar to let him take the 50 l. of T. and he would give Edgar a Bill of Exchange to receive so much at London: accordingly T. promises to pay Chetham the Money, which promise he accepted, and gave a Bill of Exchange to Edgar; after T. became insolvent, then Chetham prohibits the payment of his Bill, whereupon this Action is brought. per Wadh. Windham Justice Assise, Norfolk Summer 1663. The Action lies, for Chetham having accepted the promise of T. and given Bill, &c. is now become a Debtor to Edgar, until his Bill be paid, though he never receives the Money of Thomson.

In Indebit. It is good Evidence against the Father, that Whysick was delivered to his Daughter at his request, Stone-house versus Bodvil, Hill. 14 Car. 2. B. R.

One promises a Bayliff, that if he would let one Arrested be in his House that night, he would deliver him in the morning, it's a good promise, and the Bayliff or the Plaintiff may bring the Action. Benson versus French, Pasch. 15 Car. 2. B. R.

Indebitat. The Case was, the Plaintiff sold sixty Comb of Rye to the Defendant at fourteen Shillings per Comb, to be delivered before Michaelmas, the Plaintiff delivered fifty Comb before the time, and brought this Action for the Money for it, and goods, though it was agreed the Money to be paid on the delivery of the last Rye. Per Hale Chief Baron.

1. Though the Agreement is intire, yet the several deliveries make several Contracts.

2. Though the payment was to be on the last delivery, yet a time being set for delivery it's intended to be paid when the delivery should have been.

3. The time being past, it's now a duty, and so Indebitatus lies.

4. The Defendant hath his remedy for delivering the residue. Barker versus Sutton. Lent Assise Norf. 1662.

Account.

The Court would not admit Evidence of account currant to maintain Indebitatus, because 'twould involve the Court in a tedious examination; but if the Account had been stated, then Indebit. upon the Account is usual. Keeble 2 part, 781.

Indebitatus Assumpsit pro opere, or pro servis mercimonijs, or pro servitio, or labore is good, and the particulars may be given in Evidence: otherwise of an Indebitatus generally, or pro multis beneficijs, &c. Keeble 1 part, 781. Keeble 2 part, 552.

Indebitatus lies for a Portion after the Joynture settled; so for a thousand pound on promise of so much for every Portion

Shoe Nail, but the Jury may mitigate Damages. Ib.

A promise to Harry B. within three Months, within a fortnight after they meet, and the party promises again to Harry her within three Weeks, this last promise is to discharge of the former, being all within the time of three Months; but had the last promise been to Harry her within some other time after the three Months, it had discharged the former. Hite versus Chaplin. Masch. 1658. B. R.

Indebitatus by one, Defendant gives Evidence that another was Partner with the Plaintiff at the delivery of the Wares, Plaintiff Non-suit. Franklin versus Walkers. York. Lent Assise 1667. Per Moreton. Contr. in Trespass, for there Joynt-tenancy must be pleaded.

In Assumpsit in Fact, and non assumpsit pleaded, a Release cannot be given in Evidence, unless only to mitigate Damages; but it may upon an Assumpsit in Law, to maintain non assumpsit.

Indebitatus for 9 l. Defendant pleaded non assumpsit infra sex annos, Issue inde, the Plaintiff proved a Debt of 9 l. due ten years before, and an acknowledgment of the Debt within six years, and an offer to pay 5 l. for the whole.

Per Hale, The Plaintiff Non-suit; for the acknowledgment of the Debt is no more than is done by the Plea, but there must be a new promise of the Debt within six years, to make the Action hold, and here the promise or offer to pay 5 l. gives no Action for

for the 2 l. Bais versus Smith, Suffolk, Summer Assise, 1668.

## Debt.

Debt on a Bond to perform Covenants, to deliver possession at the Terms end to the Lessor, or his Assigns; breach was assigned in not delivery to two Purchasers, demand being made by both, and Issue joyn'd thereon, in Evidence demand by one is good. 2 Cro. 475.

Nil debet.

In Debt upon a Contract, That the Contract was conditional upon Account, that there was no such Account, ne lessa pas upon nil debet, in Debt for Rent.

In Debt upon the Statute of 21 H. 8. of Farms, upon the general Issue non habuit he may give in Evidence the taking for the provision of his House, according to the proviso of that Statute. 27 H. 8. 21.

Debt on Bond to perform an Award, ita quod the Award be delivered to the parties, in Evidence, delivery proved to the Wife, is sufficient for the Jury to presume the delivery to the party himself., Per Hale Norfolk Summer Assises, 1665. Trice and Prat.

At the same Assises, Per Moreton Justice, delivery to the parties Son is good Evidence, Violet and Cook.

Debt against an Heir, &c. riens per descent, &c. a Feoffment given in Evidence made before the Action that it was fraudulent may be given in Evidence, though not pleaded.

pleaded. 5 Rep. Co. Gooches Case 60.  
Hob. 72. Vide Fitz. Tit. Garranty 88.

Debt against Executoz, who pleaded ne unques, &c. Plaintiff replied, that he Administred as Executoz, and gave in Evidence Administration granted to him by which he Administred, good. Dyer 305. But a Gift of the Goods the Defendant may give in Evidence.

In Debt against Executozs, and plene administravit pleaded, the Defendant cannot give in Evidenc a Bond satisfied, where the Executoz and Testatoz were Obligozs, per Coventry Lord Keeper, 33 Eliz. Perkins vers. Perkins.

In Debt for Tythes, Modus to a Vicar is good against the Parson, and so is a Modus to a Parish Clerk. Per Moreton Justice, Lent Cambridge, 1667. Barber versus Colier.

In Debt against Executoz de son tort, who pleads ne unques, &c. It is sufficient to charge him, by proving he hath Administred of never so little value. Clayton 6.

Against Executoz de son tort, who pleads fully Administred, the Evidence was, the Intestate made a Bill of Sale of his Goods to the Defendant; who was bound with him in a Bond as surety, for his Counter-security, but the Goods remained in the Intestates possession during his Life, for some few hours; ruled a fraudulent Deed by Barkly Justice, at York. 11 Car. Legard and Linley. Clayton 39. Quare.

If the Defendant pleads plene, &c. preter Judgments &c. The Plaintiff must prove Assets above the Sum of those Judgments. *Huntington*, by Judge Windham, 33 Car. 2.

Debt against Administrator, who pleaded plene, &c. and gave in Evidence Judgment, and good without pleading, per *Henden*, 1638. York, Clayton 65. Quære, For if Judgments be kept on foot by Fraud, and given in Evidence, how can a Creditor who sues for a just Debt, be prepared to detect this Fraud? And Note, In Scire facias against an Executor on Judgment per Testator, the Defendant pleaded fully administered generally, and the Plaintiff demanded specially, and Sir William Jones Solicitor General moved to amend the Plea, and Hale Chief Justice thought he ought to plead specially, how fully administered. *Bradford* vers. *Hutchinson*, H. 25, 26 Car. 2. B. R.

Debt for Rent on a Lease; the Evidence to prove the Lease was, that the Plaintiff leased a House to the Defendant at a Rent but no time mentioned, and it was agreed at the same time, that the Lessee was not to leave it without half a years warning per Hale, *Norfolk* Summer Assise 1668. It is a Lease at will, and the leaving on half a years warning, is but a Collateral Agreement, and no part of the Demise.

#### Ejectment.

The Plaintiff Counts of a joint Lease made by A. and B. in Evidence it appeared that A. B. and C. were Joint-tenants, that C. leased to B. and that A. and B. leased to the Plaintiff, by 3 Just. against two it is good, 2 Cro. *Jordanes Case*, 183.

Ne dona pas may be maintained by a demise; and upon a Feoffment, a Lease and Release; but a Fine and Release will not maintain a Demise to Husband and Wife.

When he that sued an Elegit brings an Elegit. Judgment to try the Title, he must in Evidence shew the Elegit filed.

Count of a joint Lease made by two, in Evidence it appears they were Tenants in common, by 3 Just. against one, it's not good, 2 Cro. 166. Mantles Case.

Count of a Lease by Husband, Evidence as a Lease by Husband and Wife with Letter of Attorney to make Livery, and 'tis made in Name of both, by 3 Just. against one it's good, for Livery as to the Feme as void, 2 Cro. Gardners Case.

Of a Lease made 5 May 10. Regis habendum from Lady-day last past for 21 years, Extunc prox. sequent. In Evidence, Lease of 5 May 10. Regis habendum from Lady-day last past for 21 years next following the date of the said Indenture, judged good and affirmed in Error, Hob. 9.

Judgment of a Rectory, Evidence of the tithing of Tithes only, and not Entry into the Glebe, the Plaintiff was nonsuit, Latch. 2. Hems and Stroud.

The Rule to confess Lease, Entry, and suffer both not extend to confess actual Entry upon a Lease, that is, the Title; But the Court said an Entry shall be intended until the Contract be proved of the other way, Siderfin 223.

But

But he that makes a Lease, or an Assignment of the Lease after the Commencement, must be in possession, &c.

In Ejectment by Lessee of Lessee of the whole by many Co-heirs, which was made by reason of the uncertainty of the part claimed by the Lessors, and per Cur. Lease of all Parts warrants Lease of all, Keeble 2 part, 700.

If a Trustee of a Lease be Lessor in Ejectment, his disclaimer in pais will avoid the Plaintiffs Title, 794.

In Ejectment, The Lease of a Guardian or Copy-holder will maintain the Declaration, though void against the Lord and Infant; but a Lease de Herbage, will not of Meadow, Hardres Rep. 330.

Ejectment of a Lease to A. of Lands in the possession of three Tenants for years, delivered to J. S. as an Escrow with Letter of Attorney to enter into all, and then to deliver his Deed, &c. Evidence, that the Attorney entred upon one Lessee in name of all, and delivered the Deed, &c. Per Jones Just. it's good enough, for where the Freehold is in one, his Entry into one Lessee for years in name of all the rest is good, Latch. 71. Dame Argols Case.

Where one declares on a fictitious Lease to A. for three years, and within the same time declares of another fictitious Lease to B. of the same Lands, the last is not good. For Trespals for the mean Profits must be brought in the first Lessees Name, ut dicitur.

In Ejectment the Defendant shall not give in Evidence a former Mortgage or Conveyance made by himself, and therefore in such Cases 'tis left for him that has the former Mortgage to get himself made Defendant before the Cause comes to Tryal.

Ejectment of Tithes; a Lease for Life of Tithes is good, if there be Church or Church-yard to make Livery in, resolved in Trial at Bar, Wheeler versus Hancher, Hill. 14, 15 Car. 2. B. R. v. Jones Rep. 321, 322.

Entry and Claim made upon the Land within five years after the death of the Baron of the Countess of Peterborough to avoid a Fine, she being Illue in Tail, proved by one Witness, and allowed at a Trial at Bar, B. R. Mich. 15 Car. 2. Floyd and Pol-lard.

Custom of Copy-holders in extream is to surrender into one Tenants Hands, in the presence of credible Witnesses. A Surrender was made accordingly, but presented to be done to another Tenant, yet being proved to be done to a Tenant, it was holden by Wadham Windham Just. to be good: And by him, a Glove or a Turf is a Rod to give Seisin by, Mayes Case, Norf. Summer Assises 1663.

A Will under which Title to Land is made, must be shewn it self, and the Probate is not sufficient. Contr. if it were on a Circumstance, or as inducement, or that the Will remain in Chancery, or other Court by special Order of such Court, Eden  
D . . . . . vers.

vers. Chalkhill, Mich. 13 Car. 2. B. R. Keeble 1 part, 117.

Also Inrolment of a Dēd, which needs no Inrolment, is no Evidence, ib.

How a Parson  
In Ejection  
of a Rectory  
shall make out  
his Title.

He must prove Admission, Institution and Induction, his reading and subscribing the Articles, &c. and his Declaration in the Church of his free and full assent and consent to all those things contained in the Common Prayer, and this ought to be proved done within the time limited by the Statute, but need not shew a Right in him that presented him.

See Keeble 2 part, 484. In Evidence an Institution without Presentation, or Copy of it, was refused by the Court, albeit a Presentation may be made by Parol, but proof must be made of it, if there be Induction upon it; I think it good Evidence.

The Issue was Fine uncertain, or certain two years Rent and no more, the Evidence was of admittances on Surrenders uncertain, but all under two years Rent. Per Williams Justice, You ought to produce Fines on Descent, and Fines paid above two years Rent, 2 Bulst. 32. Allen versus Abraham.

A Lease was made by parol and agreed to be put in Writing, and Indentures bespoke, but being held for ten years, and no Indentures executed, it was ruled for a Lease parol, Per Barkley Just. 13 Car. 1. York, Clayton 53.

By Just. Berkley (1638. York, Hedges cont. Clayton 57.) A Will under Seal, proved, examined by the Original, was allowed good  
Evi

Evidence. Quære, I think the Practice against it.

A Lease and Release were given in Evidence to entitle the Plaintiff, and they both were named hæc Indentura, but were not indented: Good, Per Hales Chief Baron, Norf. Summer Assises 1668. Briant versus Trendle.

After default (in Ejectment) the Defendant may confess Lease, Entry and Duster, and may give Evidence, and have all advantages (except Challenges) and if the Plaintiff becomes non-suit, any one for the Defendant may pray it be recorded.

Per H. Wyndham Just. Bucks Lent 68. Dr. Crawlys Case. Deprivation in Spiritual Court for Simony disables from bringing Ejectment, because he can make no Lease; yet quære.

If Mortgagor continues in possession without provision for that purpose in the Deed, he is Tenant at Will, and if he levies a Fine it's no Disseisin by him continued in possession still, because after the Will determined he is Tenant at sufferance, Per Hale Chief Baron, Bedford Summer Ass. 1669.

Declaration on a Lease made 14 Jan. 30 Eliz. Evidence of a Lease sealed 13 Jan. good, for if it was a Lease 13. it was a Lease made 14. 4 Leon. 14.

If the Declaration in Ejectment be of Michaelmas-Term which relates to the first day of the Term, yet 'tis Matter of Evidence, and examinable what day the Will

was filed, and if 'twas after the day of the Lease, all is well, Siderfin 432.

Feoffments of 40 years standing, and possession going accordingly, you need not prove Libery, it may be intended per Jury, Rolls Rep. 132.

The Common Rule on which so many have split, is laying the Lease to be a *die datus*, and the Entry the same day, which is a *Disseisin*, not purged by the Commencement of the Lease, for where an Interest passes [a] is exclusive, and so the Entry the same day, is before the Lease was to Commence, and is a *Disseisin*, but in cases of Obligation where no interest passes, it is *contra, quod nota*.

### Trespas.

Count of Trespas done in one Acre, Evidence of Trespas done but in half that Acre, good, 2 Cro. Winkworths Case.

The Lady Hatton brought Trespas for breaking her Close, and taking away her Horse, &c. against two Defendants, they plead Not Guilty, as to the taking of [Her] Horse, as to the rest, they say that the Horse of one of the Defendants was in the Close, &c. and they took him out doing as little damage as they could, *quæ est eadem* &c. The Plaintiff replies *de injuria sua propria*, &c.

The Evidence was, That the Plaintiff as Lady of the Mannor took the Horse as an Estray, and it was cryed and marked, &c. that the Defendants refused to pay for the  
 Beat

Peat, and took him away, befoze the year and a day was out.

1. Per Wadh. Wyndham Just. d'Assize, A Lord may detain an Estray for Peat, yet no Trespass lies if the Owner takes him, but an Action of the Case lies for the Peat.

2. If the Action had been brought against the Servant only, he must justifie, &c. But being brought against Master and Servant, this joint-justification is good.

Cambr. Summer Assises 1667. Lady Hatton against Cotes and al.

In Trespass, the Evidence for the Defendant was, That the Defendant had a Barn, and purchased a Way over the Plaintiffs Land to that Barn, after the Defendant bought other Lands lying contiguous to that Barn on the one side, and to a Haven on the other side, and carried Carriages by that way to the Barn, and through it over his own new purchased Land to the Haven. Per Hale Chief Baron, If I purchase a general Way to such a place, I may go from thence on my own Ground whither I please, though I purchase the Ground after the Way purchased, Summer Assises Norf. 1665. Heynsworth vers. Bird.

Trespass was brought against many, by a School-mistress, for taking away a Child (her Scholar) with a Scarf of the Mistresses; per Keeling Ch. Just. In Trespass for taking [things] all are Principals that are present and consenting; Contra, in taking [Persons] And this Action lies not by the Mistress for the Child, but for the Scarf  
D 3 only

only, Lent Norf. Ass. 1663. Mary Coopers Case.

Trespas lies for Lessee in Ejectment on a fictitious Lease to recover mean Profits during the continuance of that Lease mentioned on Record: And the Recovery shall maintain it. Otherwise if brought by the Lessor, for he is no Party to the Action.

But see Siderfin 239. If a Recovery be in Ejectment, and afterwards Trespas is brought for the mean Profits before the Lease, nothing shall be given in Evidence but the value of the Profits, and not the Title, for otherwise Trials would be infinite.

Also if it be between the Parties the Record is an Estoppel; and so the Court held it should be if it was against under Tenants.

But quære if the Defendant be one that has a Title, if he cannot give this in Evidence, for otherwise it would be a great mischief.

Trespas lies not for pulling down a Pew in a Church fastned to a Pillar with a Chain. Contra, had it been fired by Balls driven into the Pillar, Per Glyn Ch. Just. Trevors Case.

Trespas quare fregit liberam Warren suam, and took his Conies. In Evidence it appeared that the Plaintiff had liberty of Chase in the place, which though it includes Warren; yet a general Trespas lies not, but an Action of the Case, C. of Arundels Case, Pasch. 1658. B. R.

Per Earl Sergeant, If Beasts be impounded, and the Key lost, the Officer by Replevin may break the Pound, and deliver the Cattle, per Stat. Marlebridge, 52 H. 3. 21.

Tenants in Common must join in Trespass done against them, so Abowry, Lead and Lamsteads Case, 7 Car. B. R. cited by Finch in Argument. Or Tenant in Common surviving shall have Trespass.

In Trespass, The Defendant sets forth a conditional Reoffment for payment of Money at such a day and place, and that he paid it accordingly; Issue joined on the payment at the day and place, Evidence of payment before the day is not good. Contra, had the Special Matter been pleaded with acceptance, More 47.

In Trespass with Continuando to recover mean Profits, an Entry and Possession of the Land before the Trespass must be proved, and also another Entry after the Trespass.

In Trespass, the Defendant prescribes to dig in the Common for Clay, to repair ancient Houses holden of that Mannor, and good, Berney vers. Stafford, Norf. Lent Assises 1667.

In Trespass they were at Issue on Not Guilty, and at the Assises the Defendant left his former Plea, and pleaded an Accord with satisfaction, the Judge would have had it replied to and tried presently, but the Council refused, whereupon the Jury was sworn, and the Plaintiff nonsuited, Bedford Assises Lent 1667. Green vers.

Reynolds. But this was contrary to the Opinion of Sir Orlando Bridgman, at the same Assises, and contrary to 10 H. 7. 21. and 1 Bul. 92.

Trespas lies by Recoberoꝝ in Erroneous Judgment for a mean Trespas, because the Plaintiff in Writ of Erroꝝ recovers all mean Profits, and the Law by fiction of retaliation will not make a wrong-doer punishable, 13 Rep. Co. 22. but Contra, where Act of Parliament restores, &c.

Trespas for Assault and wounding in Suff. the Defendant as to vi & armis non Cul. As to the other justification of molliter Manus, &c. in Norf. and severall Tryals, Per Hales Ch. Baron, Suff. Ass. Summer 1668. the vi & armis can't be tried till the other be tried. Contr. If the first Issue of non Cul. was as to the wounding; and by him Evidence of Libery of Seisin, generally shall be intended for life only.

Son assault  
demefine.

The Defendant proved the Plaintiff threatened the Defendant by saying, Were it not Assise time, he would tell more of his mind, which he said, bending his Fist, and with his Hand on his Sword, per Cur. This is no Assault, as it would be without that Declaration: But it was farther sworn the Plaintiff with his Elbow puncht the Defendant, which if done in earnest Discourse, and not with intent of Violence is no Assault, nor then is it a Justification of Battery after a Retreat, Keeble 2 part, 545.

The

The Hogs of B. were put into the yard of A. and broke into the Land of C. and did Trespas, Action lies against A. though the Servant of B. did look to them and serve them, by which the Owner had the special Possession of them. So if agisted Cattle do Trespas, the Agistor shall answer, Dawtry vers. Huggins, Clayton 33. per Barkley, 11 Car. York.

A. by Indenture of Uses raised an Estate to B. in Fee, who regrants Turbary to A. by another Deed, and after A. levies a Fine to confirm the Estate and Uses above said declared; this doth not touch the Turbary, per Vernon, 11 Car. York, Clayton 42.

Any one imployed by an Officer, is an Officer within 7 Jac. 5. to plead general Issue, and give the special matter in Evidence, Clayton 54.

Prescription to Tether Equos & Boves upon such a Walk, &c. Mares and Cowes, good Evidence within that Prescription, Per Barkley, Clayton 54.

Per Hale, A Corporation may Bargain and Sell, though it has been thought an Use upon Use, they being seised to the use of their House: But I think it rather a Trust than an Use.

If a Justice of Peace send his Warrant to J. S. (who is no Officer) to bring one before him, if J. S. be no Officer, he is not bound to execute it, yet if he does execute it, it's good, and he may execute it in any part of the County. And so a Constable of one Town may execute a  
Warr.

Warrant in any other Town in the same County, and any such Warrant is as large as the Justices Commission is, per Hale Norf. Summer Assises 1668. Wrongries Case.

In Trespas against one for Gleaning on his Ground, per Hale Norf. Sum. Assises 1668. The Law gives Licence to the Poor to glean, &c. by the general Custom of England, but the Licence must be pleaded specially, and can't be given in Evidence on non Cul.

In Trespas quare Clausum & Domum fregit Et alia enormia ei intulit, after Verdict for the Plaintiff and 60 l. Damages, 'twas moved for a new Tryal by reason of excessive Damages, and upon Affidavit that the Jury intended great part of the Damages for the Injury the Defendant did to the Plaintiffs Daughter, &c. which came in under the & alia enormia, the Plaintiff had Judgment; and a difference was taken, that Damages ex turpi causa may be given in Evidence under this General Clause, Et alia enormia, but from nothing else, Siderfin 225. Sippora versus Basset.

### Trover.

The Citizens of London gave in Evidence their Custom to take Toll, Jones 240.

In Trover, for an Horse proved of 15 l. value, the Jury gave but 3 l. Damages, upon mistake, they thinking that the Plaintiff had his Horse again.

Per Wadh. Wyndham; If the Jury had not been gone, they should have mended their Verdict; but a new Action of Trover lies for Damages for the Horse, in which the Jury shall prove the 3 l. given was only for the Conversion, not the value of the Horse; and by him, Trover lies for Goods in the Plaintiffs possession, to recover Damages for the Conversion only, Tyndal vers. Jolliffe Norf. Lent Assises 1660.

In Trover by Administrator where the Conversion was in the time of the Intestate the Plaintiff must shew the Letters of Administration. Contr. where the Conversion was after his death, Per Hale Norf. Sum. Ass. 1660.

If an Estray be claimed within the year and the day, &c. and the Lord refuses to deliver it; Trover lies, though the keeping is not paid for, and the Lord says he detains for the same; and the Lord can't detain for the Heat, &c. but must bring his Action, Per Moreton Justice Lent Norf. 1667. Bond vers. Paston, Quære: vide Dent Tit. Trespass per Wyndam contr. and I think is Law, Vide Rolls Tit. Estray 889.

At the same Assises Daniel versus Berney, by Moreton Justice, Proclamation may be made of an Estray by any Person, and it is not necessary that it should be made by the Bell-man or any other Officer, Vide Co. Entries 170. Barber vers. Fawcet. In Trover, Issue was joined on tender of amends for keeping, &c. and Verdict pro Plaintiff and Judgment.

Note,

Note, I find Precedents, that in Trover, the matter of an Estray may be pleaded specially, or given in Evidence on Not Guilty.

Oats were taken from the Owner, and carried to a Miller to make into Oats meal, and before it was done, the Owner prohibits the Miller, &c. and demanded the Oats, who, notwithstanding, made them into Oat-meal, Per Barkley it's a Conversion in the Miller, 1638. Clayton 57. Holworths Case.

On non Cul. The Defendant gave in Evidence, a Seizure for Goods Foreign bought and Foreign sold. Per Custom of Lynn Norfolk, good, per Hale Norf. Sum. Ass. 1668. Harwich ver. Twells.

A Man lends his Horse to a Special Purpose, the Bailee abuses the Horse, and over works him, then the Lender takes the Horse again. Per Hugh Wyndham Justice Lent Assises Bucks. Trover lies not, Constables Case.

### Dower.

In Dower, the Issue was ne unque seisie que Dower, and for the Plaintiff, a Feoffment in Fee was given in Evidence to the Husband, the Defendant would have given in Evidence, a Seisin in Tail with a Discontinuance, and then the Feoffment, &c. and so a Remitter, but it ought to be pleaded per Cur. Dyer 41. For an Estate upon Condition.

If an Heir Mortgage for years, and then assign Dower legally i. e. a third part of the whole, the Assignment shall bind the Mortgagee; Contr. if the Assignment be illegal, as of one whole Manor when there were three Manors; that being not as the Law would have done it. And if a Disseisor assign a legal Dower, it's good: But if the Heir Mortgage in Fee, and then assign, &c. legally, &c. that is not good, because the whole Freehold was out of him at the time of Assignment, per Hugh Wyndham Justice, Bucks Lent Ass. 1668.

## Account.

Against S. as Receiver of two 30 ls. and as Bailiff for receiving his Rents for several years, not paying any certain Sum of Rents: Per Carl Sergeant, The proper way is to find quod Computet, as to what is certain in the Declaration and so proved, as the Money was, but not to the Rents, and so he said was the Opinion of Hale. But per Moreton Justice, the Verdict shall be general, and it may be both ways, Sayes Case, Norf. Lent Assises 1667.

Thus far I have made an Essay of a Method to be farther built upon by our Practiser, and have given some Cases, not in Print, and (it may be) useful. I shall add some other Cases, not so proper for Heads, except that of [Evidence] with which I shall conclude this Chapter.

## Evidence.

## Evidence.

Inspection of a Deed inrolled may be given in Evidence, Contr. of a bare Deed not inrolled, or of a Deed that needs no Inrolment, Pasch. 1655. B. R. Goodfords Case.

An Inspecimus lieth only of Matter of Record, and not of a private Deed, Keeble 2 part, 294.

A Deed to lead the Uses of a Fine was inrolled on the acknowledgment of but one of the Parties to it, and was allowed by Glyn Chief Justice in Evidence, as Roll Chief Justice had done before him, though no binding Evidence, Turber vers. Maddison Pasch. 1655. B. R.

An Office found at a Death, &c. may be given in Evidence.

A Verdict against one, under whom either Plaintiff or Defendant claims, may be given in Evidence against the Party so claiming. Contr. if neither claim under it, Duke and Ventres, Mich. 1656. B. R.

If an Action be brought on a Statute, which has several Provisoes in it, the Defendant may plead Not Guilty, and aid himself by any of the Provisoes in Evidence. But if Provisoes be made to that Statute, of which the Defendant may take advantage, he ought to plead it, and not give it in Evidence, Per Roll Chief Justice, Mich. 1650. B. R. Jones 320. accord.

Joitenancy in Trespals cannot be given in Evidence; but must be pleaded in Abatement, Jones vers. Randal, Hill. 1652. C.B.

Arrest and Imprisonment to prove a Bankrupt must be proved by Record, Newby vers. Bathurst, Pasch. 1659. B.R. In a Trial at Bar, what Evidence proves a Bankrupt, Keeble 2 part, 487. Bankrupt.

The Custom of New-England to marry by the Magistrate in the presence of a Minister, was allowed good by Hale Chief Justice B. R. Trin. 1663. at Guild-hall, int. Hall & Hall.

The Certificate of the King under his Sign Manual was allowed in Chancery for proof without Exception, Hob. 213.

Records, as Patents, Statutes, Judgments, may be given in Evidence, Hob. 227. contr. Dyer 129.

To prove an Extent upon a Statute or Judgment, you must prove a Copy of the Statute and Judgment, as well as the Copy of the Writ and Extent.

When Records are pleaded, they must be sub pede Sigilli, contr. if given in Evidence, Miles 22. Whites Case.

An Answer in Chancery, is Evidence against the Defendant himself; but the Bill must be proved, Godb. 326.

If the Party make Oath that he cannot find his Witness, then he is as it were Dead, and his Depositions in an English Court may be given in Evidence betwixt the same Parties, Godb. 327. Not only the Plaintiff, but any Stranger may give the Defendants Answer in Evidence against the

the Defendant, but not against others, Siderfin 221. A Bill in Chancery given in Evidence against the Plaintiff himself, where there are Proceedings upon it, Keeble 2 part, 499.

Upon a Traverse of a Lease parol for years, viz. Absq; hoc quod A. demisit, &c. Nihil habuit in tenementis, may be given in Evidence, Dyer 122.

Shewing a Grant to dig Turfs, is no Evidence against a Prescription for the same, but the Grant being the same with the Prescription, shall be taken as a Confirmation. Crew & Vernon, Moor 819. Quære tamen vid. Moor 830. Where a Court of Pipowder is claimed by Prescription and Grant, and good, 2 Cro. 313. Acc.

In Trespas for taking Goods after Judgment, per confession, non sum informatus, &c. nil dicit, Property need not be proved to a Writ of Inquiry, for it would oppose the first Judgment, Quod querens recuperet, and the Judges might have assessed Damages if they would, Yelv. 151. Yet quære, If the Defendant may not disprove Property in mitigation of Damages; for the Jury may find no Damages.

A Copy of a Dæd, is good Evidence where the Defendant has the Dæd, and will not produce it, Per Vernon Justice, Clayton 15.

So that there was a Revocation, is sufficient for the Heir, without shewing the Dæd it self, which was taken away by the Defendant, so that the Witnesses to the Rev

Release proved the Lease without shewing, being taken away by the other side.

A Deed of Feoffment without Livery may be given in Evidence as a Release, Per Berkeley, 11 Car. Clayton 32.

If a Fine be given in Evidence, with five years non-claim, &c. the Fine must be shewed with the Proclamations under Seal, and the Cirograph will not serve.

The Confession of a Party must be taken whole, and not by parts; As if to prove a Debt, it be sworn that the Defendant confessed it, but withal he said at the same time, that he paid it, his Confession shall be valid as to the payment as well as that he owed it, Per Hale Chief Justice. And so is Common Practice.

A Deed cancelled by Practice, was allowed to be read, in Evidence in Action under that Deed, the Practice being proved, Hetley 138.

Against a Purchaser bona fide, recital in a Deed of Money paid is not sufficient, nor Acquittance for the Money, unless it be of ancient standing, and then it shall be presumed.

The Deed to lead the Uses of a Fine surconcedit, need not be proved per Testes.

If a Deed of Feoffment be shewn, but no Livery, Possession going with the Deed, is Evidence to a Jury to find Livery.

At Guild-hall, Trin. 23 Car. 2. Hale Chief Justice cited the Case of Sir Paul Pindar, A Levary, &c. was proved by a recital of it in another Record, and Hale and Mainard demurred on the Evidence, and adjudged against them,

them, for this Cause, viz. That it was proved there was such a Record, that it was filed, that it was taken off the File. But (by him) generally without such proof, the Evidence is not good, because one Record may recite one that never was.

Office of the  
Jury.

The Jury are to decide the Fact, and Evidence is not given but to inform them in their Consciences of the truth, for although no Evidence is given of either side, yet they may give their Verdict of one side or the other. 14 H. 7. 29. And therefore although two Witnesses are necessary, where the Tryal is by Witnesses, as in the Civil Law; yet they are not of necessity where the Tryal is by Jury. And where Witnesses are joyned with the Jury, yet they may be rejected, if they will not agree with the twelve, and the twelve may give their Verdict.

The Jury after they are departed from the Bar, may return to hear their Evidence of any thing they doubt before the Verdict.

Done in Tayle.

Sur Travers de done in tayle, the Witnesses prove, That another made the Done; this doth not warrant the Issue.

Extortion  
vers. vic.  
Fec.

In an Action against the Sheriff upon the Statute of Extortion, that he took it for Barr-fee of one who was acquit, is good Evidence.

Possession.

Possession is an Evidence of right, and he that hath possession may distrain the Cattel of him that hath no Title, for the taking is in respect of the possession, more than of the title.

In Debt for Rent upon a Lease, and Debt for Rent. nil debet pleaded, ne unques seisie de terre is good Evidence, otherwise upon the Plea of riens arriere, or levy per distress.

A Receipt of the last half year is Evidence that all before was paid.

Eviction or expulsion may be given in Evidence upon nil debet in an Action of Debt for Rent.

Parson or not Parson, in such Issue you Parson. may give in Evidence a resignation, although it be in another County and Spiritual.

In riens passe per le fait, Not his Deed Fait. may be given in Evidence.

In Trespass, quare clausum fregit, with Abuttals, all the Abuttals and descriptions must be proved. But if the Abuttal be laid North, &c. and it incline North, though not directly, it is sufficient: & sic de cæteris. What ought to be proved in Evidence. Abuttals.

Upon this Issue, the account given to the Ordinary, shall not be given in Evidence, nor any respect had to it. Plene Administravit.

That the Executor paid a Legacy, is Evidence that he had Assets.

Will. The Probate is good for the personal Estate, but not to prove a Will in Writing of Land by the Statute. What shall be given in Evidence, and what is good Evidence.

Recital of other Grants by Letters Patents, in Letters Patents, are some Evidence, but not fit to be allowed, without shewing the former Letters Patents or a Copy. But the Jury may find them. Recital in Letters Patents.

The proof of this surmise in any Court of Record, shall not be given in Evidence Surmise in a Prohibition.

in another Action, upon the same custom, because the Defendant in the Prohibition cannot cross examine.

Depositions.

Depositions in the Court Christian, in the Court of the Council of York, touching the title of Land, of which they have not cognisance, or in another Suit against him, who claimeth not under those parties, by the Commissioners upon a Commission of Bankrupt, because the party could not cross Examine, shall not be allowed in Evidence. But see Keeble 2 part, 348.

Littletons  
Rep. 167.

Sentence.

But a sentence given in the Spiritual Court touching Tythes, may be given in Evidence in an Action at Common-Law, for this is a judicial Act.

Costom.

To lay a custom to a House and Land, to prove it to Land only, not good. Godbolt 234.

Recusant.

The Record of Conviction of Recusancy being burnt, may be proved by the Roll of Extreats of the Clerk of Assise, signed by the Judge and delivered into the Pipe, or by other Evidence (as a Fieri facies, &c.) may be proved by other Evidence.

Fraud.

A Voluntary Conveyance is not fraudulent, because voluntary; but it is a great Evidence of Fraud against a Conveyance made bona fide, and therefore this Fraud must be found by the Jury. Keeble 1 Vol. 486.

Church.

'Tis good Evidence to Convict one upon the Statute Eliz. for not coming to Church, to prove that the party was not at his Parish Church, such a Sunday, and the party may shew that he was at Church elsewhere.

After

After Evidence given, and the Jury ready to give their Verdict; and then the Attorney General will not proceed, but draws a Juroz, and brings another Information, none of the former Juroz shall be admitted to give in Evidence, that the Jury were ready to give their Verdict against the King in the first Information, for this ought not to be discovered, for so no benefit would accrue to the King by his Prerogative to draw a Juroz.

Former Trial.

But this may be given in Evidence in another Action, where the King is not concerned.

What may be given in Evidence upon a special Issue.  
Debt for Rent.

In Debt for Rent upon non dimisit, that the Lessor riens avoit in the Land at the time of the Demise, may be given in Evidence.

So upon Nil debet an eviction may be given in Evidence. If the Lessor enter into part, the whole Rent is suspended; but if a stranger evict the Lessor of part of the Land, the Rent must be apportioned.

Upon an Issue of Common appendant, &c. common per cause de vicinage, cannot be given in Evidence.

Common.

If the Defendant plead son assault demesne, in Battery, and the Plaintiff reply, de injuria sua propria absque tali causa, and so Issue is joyned, if there was a battery at another day, than what the Plaintiff and Defendant have assigned upon the Plaintiff, and another upon the Defendant by the Plaintiff, the Verdict ought to be for the Defendant; for if the Defendant prove any Assault made upon him by the Plaintiff, this ought to be found for him, although it was at another day than what

Son Assault Demesne in Battery.

what he hath alledged, for the day is not material: but upon such special justification the Defendant hath liberty to prove his Plea at any time, and the Plaintiff might have made a new assignment at another time, for peradventure there might be several Trespasses at several times, to which the Defendant may have several Pleas, and therefore if such manner of pleading should not be allowed, and such Evidence, the Defendant could not tell how to help himself, nor could know for what Trepasse the Action is brought. Vide devant hic & apres cap. 13.

**Surrender.**

If the Issue be whether the Kings Tenant by Letters surrendred to the King or not, the accepting of new Letters Patents, which is a surrender in Law, is good Evidence.

**Non assump-  
st.**

In a special promise to pay 20 l. if the Plaintiff would pay 10 l. &c. and an averment that he paid the 10 l. Upon non assumpsit, the Defendant shall not give in Evidence that the Plaintiff did not pay the 10 l. neither is the Plaintiff bound to prove it, for the Issue is upon the assumpsit, and not upon the payment of the 10 l. which might have been traversed. And although 'twas said, That in all Actions there is a general Issue to be taken, which shall put all the Declaration in Issue, and that must in this be non assumpsit, or nothing, yet by the advice of all the Justices of Serjeants Inn in Fleetstreet, it was ruled as abovesaid Mich. 16 Car. B. R. between Holditch and Brodrig. I have been the more particular in this, because I have known Plaintiffs

non

non-suited in such Cases at the Assises for want of proving the averment: although I must confess I never agreed with the Judge herein that did it. For it is a mistake to say, The Plaintiff must in all cases prove his whole Declaration; if he proves the matter in Issue, he ought not to be non-suited. Rolls tit. Tryal, 1681.

If an Abowson be pleaded to be granted *Grant per fait*  
Per fait, and this Issue is taken by a stranger Where it is  
to the fait, if it be found granted sans fait, sufficient to  
or by another fait it is good, for the Deed prove the ef-  
is surplus, and the effect of the Issue is upon fect of the  
the grant, not upon the fait. Issue.

If an Imprisonment by Dures at D. be *Dures.*  
in Issue, 'tis not material whether he was  
ever at D. or not, for the effect of the Issue  
is, if the Deed was made by dures.

So of a Feoffment pleaded by Deed, a Feoffment.  
Feoffment without Deed, or another Deed is  
good, for the effect of the Issue is upon the  
Feoffment, not upon the fait.

In Escape of a Prisoner, and the Issue *Fresh Suit.*  
is, if the Gaoler immediately after the es- *Escape.*  
cape made fresh Suit, if the Prisoner hath *The Writ, the*  
escaped a day and night before the Gaoler *Warrant, Ar-*  
knew it, and then he makes fresh Suit, it *rest and Es-*  
is sufficient to prove the effect of the Issue, *cape are to be*  
for convenient pursuit is immediate fresh *proved in an*  
Suit in Law. *Escape.*

In Escape against the Marshal the Plain-  
tiff must prove the person that escaped in  
actual custody since the Commitment, which  
Commitment either in the Marshals Book, or  
on Record is not sufficient, without a proof  
of being in actual custody since. Keebles

1 Vol. 375, 775. See Keebles 2 part, 384. What may be given in Evidence upon an Information of negligent Escape, against the Marshal of the Kings Bench, as a Recovery in the Original Action, and the Plaintiff allowed a Witness, because he neither gains nor loses.

*Non demisit  
modo & forma.*

If in pleading an Indenture of Demise you mistake the recital, and the Issue is non demisit modo & forma; The mistake shall not hurt, for the effect of the Issue is upon the demise.

If the date or number of years be mistaken, 'tis fatal.

*What things  
may be given  
in Evidence  
upon the ge-  
neral Issue.  
Trespas.  
Battery.*

If a Man plead Not Guilty, he cannot give in Evidence a matter justifiable, which shall be a confession of the Act, for this is contrary to the Issue. As son assault demerit in Battery upon Not Guilty: but upon Not Guilty in Trespas for beating ones Servant, per quod servitium amisit, you may give in Evidence, that the Plaintiff did not lose his Service by the Battery.

*Wast.*

Not upon nul wast fait, can he say, sufficient repair devant le brief purchase.

*Servant.*

If my Servant without my consent put my Cattel in the Land of another, I may plead Not Guilty, and give this matter in Evidence; for by putting the Cattel in, the Servant has gained a property.

*Information.*

Upon Not Guilty, he may give in Evidence a discharge by a Proviso in the same Statute, for thereby he is Not Guilty, Contra formam Statuti, but not a Discharge by another Statute.

Upon

Upon non habuit seu tenuit ad firmam contra formam Statuti, the Parson may say, he took the Farm for maintainance of his House, according to the Proviso in Debt upon the Stat. 21 H. 8.

But upon the Statute 5 E. 6. for ingrossing, upon Not Guilty, 'tis said, That the Defendant cannot give in Evidence a Licence according to the Proviso of the Statute. *Id quare rationem.*

Upon ne unique son Receivor, &c. the Defendant cannot say that he paid the Money according to directions, &c. *Account.*

In a Scire facias against Ter-tenants and Scisin. Feoffment pleaded before the Judgment. *ment.* *que hoc,* that he was seised Tempore iudicii, and Issue upon the seisin, that the feoffment was fraudulent, to defraud the Judgment, may be given in Evidence; but otherwise, if the Issue had been upon the feoffment.

So upon riens per discent, by an Heir in Debt upon an Obligation, That the Defendant aliened the Assets by fraud and cobin, and so void by the Statute of 13 El. may be given in Evidence, because these are the general Issues. *Riens per discent.*

In Trespass for taking a stack of Corn, the Evidence may be of part, and the Verdict as to four Combs or Bushels, Guilty, and as to the rest, Not Guilty. *Parcel.*

In an Information for Writing, Printing, and Publishing a Libel, That Copies were found in the Defendants Chamber, and no publication, without discoursing it in delivery of it out, *Libel.* *Keeble 2 part, 502.*

If

If in the Evidence it appear that the Bill was filed afterwards, nothing that the Defendant had in his hands, and paid before the filing of the Bill shall be allowed for otherwise there might be great inconvenience.

*Plene administravit.*

Upon this Plea the Executor may give in Evidence a retainer for a Debt due of himself of as high a nature; or payment of Debts with his own Money, and that he kept Goods of the Testator in lieu; for this alters the property.

The Original need not be shewed in Evidence upon this Plea, nor upon the Assets at the day, &c. because the day is agreed in pleading. *Per Sir Siderfin 432.*

What Evidence the Jury may have with them. Exemplifications.

They can have nothing but what is delivered to them in open Court, and given in Evidence by the Party in Court, if an Exemplification come out of Chancery. Witnesses examined there upon Oath, who are dead, the Jury shall have this with them; but if the Exemplification comprehend some Witnesses alive and some dead they shall not have it with them. Neither shall they have any Pedigree drawn by Herald at Arms, for it is no Evidence, only information for direction. What Evidence the Jury may have with them, see the 14th Chapter.

Pedigree.

Not an Office before an Escheator, unless exemplified, nor a Testimonial, nor a part of a Fine indented unless exemplified, but they may find the same specially.

If a Man makes a Feoffment and afterwards makes another, with Covenants that the first shall be a Witness, &c. and afterwards an Issue taken upon the first Feoffment, the first shall not be a Witness.

In an information for Usury, the party shall not be a Witness, because he would thereby avoid his own Bonds, &c. and be in propria causa.

In case of Forgery, Perjury and Usury, the party grieved may have advantage by the Verdict, and therefore shall not be received as a Witness; but in Case of an Indictment for Battery, he that was beaten may be a Witness, because he can reap no benefit by the Verdict in another Suit. Hardres

331.

Three Men swear an Arbitrement in Perjury. In several Actions against them, upon Statute 5 Eliz. of Perjury, each of them shall be a Witness for the other; but in an Indictment of Perjury upon 5 Eliz. the party grieved shall not be a Witness, for he shall have 20 l.

Conventicle of thirty or forty is evidence of Terror. Terror, &c. Keeble 2 part, 558.

Common experience tells us upon an Indictment for Battery, &c. the party grieved shall not be a Witness, because 'tis only for the benefit of the party.

In an Action against the Hundred upon Statute of Winton, &c. the Lessor living of the Hundred may be a Witness, for no reason that he and his Lessee being Inhabitant should be both charged: If the Hundred be robbed of the Masters Pony, the

Who may be Witnesses.  
Not persons interested either in Law or Equity, in presenti or futuro.  
Usury.

Perjury.

Terror.

Hundred.

the Master may be a Witness to prove the delivery of the Pony to the Servant before the Robbery. Rolls Tit. Tryal, 686.

Proceedings  
in Ecclesiasti-  
cal Courts.

A thing which is concluded in the Ecclesiastical Court concerning Lands, is not to be given in Evidence to Juries, for the Courts of Common Law are not to be guided by their proceedings. Mich. 22 Car. B. R.

Matter in  
Law.  
Vaughans  
Rep. 143.

Matter in Law is not to be given in Evidence, for the Jury are only to try matters of Fact. The adverse Party may demur to such Evidence. 3 H. 6. 36.

Ancient Wri-  
tings.

An ancient Writing that is proved to have been found amongst Deeds and Evidences of Land, may be given in Evidence, although the executing of it cannot be proved, for 'tis hard to prove ancient things, and finding them in such a place, by presumption, they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty. 24 Car. B. R.

Totum & pars.

A Writing or Answer permitted to be read in part, may be read in toto.

Copy of Re-  
cords.

A Copy of part of a Record cannot be given in Evidence, unless 'tis proved that the part shewed in Evidence is all concerning the matter in question.

Transcript  
Enrollment.

A Transcript of a Record or Enrolment of a Deed may be given in Evidence, for they are things to be credited, being made by Officers of Trust.

Council.

The Council of that Party, which doth begin to maintain the Issue, whether of Plaintiff or Defendant ought to conclude.

A Juroz who is a Witness must be also Juror.  
 sworn in open Court to give Evidence,  
 he be called for a Witness; for the Court  
 and Council are to hear the Evidence as well  
 as the Jury.

The Jury may carry from the Bar an Ex- Exemplifica-  
 mplification under the Great Seal of De- tion.  
 positions in Chancery, but if they are not ex-  
 mplified, the Jury can only look upon them  
 at Bar, but not have them with them out of  
 Court.

If one produce a Lease made upon an Lease upon  
 Outlawry, to prove a Title, he must also an Outlawry.  
 produce the Outlawry it self: but if it be to  
 prove other matter, he needs not shew the  
 Outlawry. And so it is of an Extent, with-  
 out shewing the Statute or Judgment on  
 which the Extent is grounded.

By Rolls an Office found after the death Office.  
 of a Tenant in Capite of Lands in another  
 County, may be given in Evidence to try  
 the Title of those Lands, if there was a  
 Special Libery granted unto the Heir.

If a Witness be Bail, upon motion the Bail.  
 Court will give leave to alter the Bayl.  
 Stiles 385.

Debt on 5 El. 9. Because the Wife did Wife.  
 not appear, whereas he charged her and ten- Charges.  
 dred to her her charges, and though not laid  
 what damages, yet being for the 10 l. upon  
 the Statute, not for his damages for her  
 not appearing, and a Feme Covert being  
 within the Statute, 'twas held good enough,  
 3 Cro. 130. Leon. 122. Note, she being the  
 person who was to appear, the charges are  
 to be tendred to her or her Husband.

Debt

Charges.

Debt for 10 l. against a Witness, upon the Statute 5 Eliz. doth not lye, unless the Witness hath his charges, and he is not bound to come without his charges first paid: but if he accepts of 12 d. and a promise for the rest at the Tryal, he is bound and an Action lyeth against him, if he doth not come. Cro. 1 part, 522, 540. Goodwin against West.

Chaplain.

A Copy of his Retainer by a Nobleman, entred in the Court of Faculties, denyed to be given in Evidence. Littleton Rep. 1. Where one that had seen it under the Hand and Seal of the Nobleman, was allowed a good Witness, because the Plaintiff was a stranger, &c.

*Quare impedit.*

In Evidence, he which affirms the matter in Issue, ought first to make the proof to the Jury. lb. 36.

Counsellor.

A Counsellor may be examined as a Witness against his Client, so far as it is of his own knowledge, not what his Client reveals to him, but what he knows only by his Clients information.

Counsellor.

Spark against  
Middleton.)  
Keeble 1 part,  
505.

Mr. Aylet having been Counsel for the Defendant, desired to be excused to be sworn on the general Oath, as Witness for the Plaintiff, to give the whole truth in Evidence, which the Court, after some dispute granted, and that he should only reveal such things as he either knew before he was of Counsel, or that came to his knowledge since by other persons, and the particulars to which he was to be sworn were particularly proposed, viz. What he knew touching a Will in question, and the Court only put the

the question, whether he knew of his own Knowledge, &c.

In Criminal Causes against the King, Criminal Witnesses may be sworn, unless the Crime Causes. be Capital.

Tenant at Will of part of the Lands Tenant at will was admitted to prove Livery of Seisin, and the execution of a Feoffment under which he held, Bulst. 1 part, 202.

If one be attainted of Felony and par- Attainted of doned, he shall not afterwards be sworn of Felony. a Jury, for Poena mori potest, culpa perennis erit, and therefore is not fit to serve on the Inquest, nor yet to be an indifferent Witness, and two such Persons proving a Suggestion, were rejected, and the Prohibition disallowed, Brown against Crasham, Bulst. 2 part, 154.

In Trespas with a simul cum, if no- Simul cum. thing be proved against them in the simul cum, they may be examined as a Witness, Stiles Rep. 401.

Neither he that pays or takes Collection Poores concerns. can be a Witness in such Cases.

Cestuy que Trust is not to be admitted a Witnesses. Witness where the Title of the Land comes in question.

One who would have any Collateral Trust. Title to the Land, as if he hath a good Deed by the Ancestor who would charge the Land in the Hands of the Heir, is not to be admitted an Evidence.

But one who has an equitable Collateral Title upon the Land is admittable to be a Witness.

The

King.

The Kings Message or Letter shall not be allowed for Evidence between Party and Party; otherwise where the Matter was secret, and that the King only had Personal Knowledge, as in Sir George Reynolds Case, Co. 9 Rep.

Depositions.

Regularly the Depositions in Chancery of a Witness shall not be given in Evidence if he be alive, although he be beyond Sea, as in Ireland, &c. otherwise if he be in France, or another Kingdom not subject to the Dominion of our King.

Pasc. 20 Car. 2.  
Colt vers. Colt.  
Perjury.

Indictment of Perjury doth not disable a Witness; otherwise of a Conviction, whether it be by Common Law or Statute.

Sid. 269.  
Consent.

Upon a Motion there was a Rule made by consent, That a Deed shall be allowed upon Evidence at the Assises without proving of it, which was allowed because of the consent.

Mich. 18 Car. 2.  
B. R. 66. Smith  
vers. Rawlins.  
Impropriation  
Vicar.

Upon Evidence at Bar it was agreed that an old Impropriation shall be presumed to be well and lawfully made. A Vicar might anciently have been endowed without a Deed sealed, being only an Ordination of the Bishop, and Allotment of Maintenance.

Trustee.

A Trustee cannot be a Witness concerning the Title of the same Land, the Interest in the Law being lodged in him.

Mic. 19 Car. 2.  
B. R. 67.  
Witness.

By Twisden and Windham, if an Action be brought against two, and no Evidence is given against one, he may be a Witness himself in the Case.

Agreed

Agreed by the whole Court, that if in Evidence the Executor give in Evidence, the Probate under the Seal of the Ordinary, nothing can be given to the contrary that he is not Executor; for Causes Testamentary belong entirely and originally to the Ordinary; and if the Will be forg'd the Suit ought to be in the Spiritual Court to repeal the Probate, according to 4 H. 7. 12. So of Letters of Administration it cannot be alledged that there was a Will; but if there be a Suit it must be in the Spiritual Court to repeal it. Yet some Books seem to the contrary, as Fitz. Estoppel 9. Bro. Testam. 4. 22 H. 6. 52. 21 E. 4. 50. a. Com. 282. 9 Co. 31. a. Old Entries 325. 1 Brownl. 79. Also upon Evidence it may be proved that the Probate of Letters of Administration were forg'd.

In Debt against the Heir upon an Obligation made by his Ancestor and J. S. jointly and severally, J. S. was sworn a Witness for the Plaintiff.

In Trespals against A. simul cum B. & C. B. & C. are admittable to be Witnesses if the Plaintiff hath not arrested them, or at the least demanded Process of the Sheriff to do it.

In Debt against the Heir who pleads Riens per descent, proof that the Father was seised, and that the Heir did enter after his Death, is well enough, for it shall be presumed Fee-simple till the contrary be shewn.

In Debt by an Administrator upon an Obligation, the Defendant pleads Non est factum,

Pasc. 2 Car. 2.  
B. R. 68. Nowel  
vers. Willson.

Will.

Administra-  
tion.

Joint Obliga-  
tion.

Hill. 1651.  
Coram Roll.  
Trespals.  
Simul cum.

Riens per de-  
scend.

Administra-  
tion.

factum, the Plaintiff in Evidence need not to shew the Letters of Administration, for this is admitted by the Defendants Plea of non est factum.

Where Plaintiff or Defendant is Administrator, if the Letters of Administration bear date after the Action brought, that is well enough.

Trin. 1650.  
Grand Jury.

A Clerk attending upon a Grand Jury shall not be compelled to be a Witness to reveal that which was given them in Evidence.

Mich. 1650.  
Coram Roll ad  
Gulld-hall,  
Littleton vers.  
Poins.  
Private Act.  
Just. of Peace.

The Copy of a private Act of Parliament may be given in Evidence; and if upon Collateral Issue its to be proved that such an one was Justice of the Peace, or Baronet, &c. Common Reputation is sufficient proof without shewing the Commission or Letters Patents of the Creation.

Rod. Termin.  
Servant.

In Action upon the Case for retaining of his Servant per quod servitium amisit, the Plaintiff ought to prove that the Defendant had consens that he was his Servant.

Hand.

Chief Justice said, If a Man be over Sea or Dead; the Party shall be admitted to prove his Hand by Witnesses, or comparing with other of his Writings, to which the Court agreed.

Perjury.

Plaintiff recovers against the Defendant upon the sole Evidence of J. S. and has Judgment; and afterwards J. S. was convicted of Perjury upon the same Evidence; notwithstanding the Court would not set aside the Judgment. But if it had been after Verdict that an Indictment of Perjury

jury was depending against J.S. the Court would have stopt entering the Judgment till the Perjury tried.

It was doubted by Twisden, that if one upon Evidence forswear himself, and afterwards the principal Action is annulled by Writ of Error, if afterwards he is indictable for this.

Mlc. 22 Car. 2.  
B.R. Roy vers.  
Serjant.

By Roll, If one convict of Felony be pardoned, or is burnt in the Hand, he may be a Witness again.

Felony.

After Conviction and Clergy allowed, one is capable to be a Witness per Cur.

Radford brings an Action of Debt upon the Statute of 5 Eliz. cap. 9. for 10 l.

24 Car. 1.  
Radfords Case.

against J. S. and declares that he was warned by Subpoena to appear such a day at one of the Clock in the Afternoon to be a Witness, &c. And upon Nil debet pleaded, the Subpoena given in Evidence was generally to appear at this day, and not at such an hour; and although a Subpoena to appear at such a day be of that effect, that the party ought to attend the whole day, and so as it was objected, includes that he ought to appear at this hour, yet in respect of the variance it cannot be said to be the Subpoena on which the Plaintiff did declare, and therefore he was nonsuited; and in this case no regard was had to the Ticket left with the Defendant, which was according to the Declaration.

Subpena.

In an Action brought by a Woman for slander of her, by which she lost her Marriage with J.S. the Marriage with J. S.

Marriage.  
Starch vers.  
Ely, 24 Car.  
Rot. 494.

is not traversable, but ought to be proved in Evidence.

Tithes.  
Crawly vers.  
Thorne, Mich.  
22 Car. 2.

In Debt for Tithes, if the Plaintiff declares that he is Proprietor of a Farmer, its sufficient, and may give his Title in Evidence.

Guardian.

Guardian in Socage shall be admitted to be a Witness for the Infant, for he is accountable.

Record.  
Lawrence  
vers. Key.

A Copy of a Record is not true, unless it be transcribed in the same Language, and therefore a Translation shall not be given in Evidence, as where the Record is in Latin and the Copy in English.

Copy-hold.

A Copy of Copyhold Lands may be given in Evidence where the Rolls are lost, or not lost, Mich. 15 Car. 2. B. R. Snow vers. Cutler.

Mic. 16 Car. 2.  
B. R.  
Depositions.  
Bankrupt.  
Coroner.

Note, That the Depositions taken before the Commissioners of Bankrupts shall not be used as Evidence at a Trial, although the Witnesses be dead: But Depositions taken before the Coroner, with proof that the party that made them is dead, shall be good Evidence; as it was ruled in the Case of the King and Browning, Pasch. 18 Car. 2. B. R.

Copy of a Recovery.

A Copy of a Recovery after long debate suffered to be given in Evidence, the Recovery it self being burnt. And Hale said the Exemplification of a Record under the Mayor of Bristols Hand was allowed for Evidence, Modern Rep. 117. Green and Prouds Case.

Exemplification.

On an old Recovery the Court allowed it, though no Tenant to the Præcipe could be proved, but it shall be intended, 2 Cro. 455. Mod. Rep. 117.

A Trustee may be a Witness against his Trustee. Trust, by Hale Chief Justice; but Twisden doubted thereof.

A Guardian in Socage shall be admitted Guardian. to be a Witness for the Infant, for he is accountable.

Actual prisal est bone Evidence de prove Trover. Conversion sans demand, Siderf. 264.

Case in a feigned Issue out of the Chancery to try the Forgery of a Will of Sir --- Cuts, whereby he gave to his Cousin Dorothy, now Pickering's Wife, such Lands for 99 years, wherein it was said, That if she so long live was raised out, and so made absolute for so many years. And one Mr. Baker was called a Witness for the Plaintiff, who desired the direction of the Court whether he should be sworn, because he was Solicitor in the Case for the Defendant. The Court said, That about the Matter before he was employed he is to be sworn; but we will not examine him about any Privacies in what he is employed since that time; And Mr. Attorney General said he demurred in Chancery for the same Cause, and was overruled to be examined. And it was held a Man cannot give in Evidence an Hearsay, though the Man be dead; but a Man may give in Evidence an Hearsay of an Act at the present time, thereby to fortify and corroborate what the other says.

Cuts vers.  
Pickering, B.R.  
Pasf. 24 Car. 2.

Solicitor.

Hearsay.

Pasc. 27 Car. 2.  
In B.R. --- vers.  
Cotewell.

In Ejectione, upon Not Guilty, upon Evidence to the Jury at the Bar, the Case was such, That Cotewell had a Lease for years of the Prebend of Sutton Regis in the County of Bucks, made in the time of H. 8. and being expired, he now claimed under a Lease from a Nominal Prebendary thereof founded in the Cathedral of Lincoln: But the Plaintiff claimed by Letters Patents thereof from King James, made the 7th of King James to Brent and his Heirs, who granted the same to the Widow of Sir W. Rawleigh and her Heirs, whose Daughter and Heir Sir Jervis Elwaies married; and the Possession was according to this Grant; Whereupon the question was if they ought to shew how it came to the Crown. Hale Chief Justice said, That the Statute for confirmation of Patents, Jac. takes notice that Prebend did come to the King. And in Edw. 1st. time was a device, that all that claimed Terra Regis should shew how it came to the Crown, which often vanished away. And in late Times, in a Trial at this Bar, Mr. Latch did non-suit the Plaintiff upon the claim of Monastery Lands, although he proved the House had it, because did not make out how it came to the House; but since that time the Court have intended it well come to the House, the Possession having went accordingly with it: And he said he was of Council in a Trial at Bar for an Appropriation, where it was insisted that it was Presentative till Edw. 4th's Time, and could not be appropriated without the Kings Licence,

Monastery  
Lands.

Possession.

Licence, quod Curia concessit, and he could not produce the Licence, yet because it was enjoyed ever since Edw. 4th's Time as appropriate, the Court did intend a Licence, and that the Patent was lost before the Enrolment, and accordingly the Verdict went then. The Defendant offered to read a Copy of a Lease out of the Leiger Book of the Dean and Chapter of Lincoln, but it was disallowed by the Court, for the Book it self is but a Copy, and a Copy of a Copy is no Evidence. And in this Case the Court did presume the Grant to King James to be lost, and thereupon Judgment was for the Plaintiff.

Copy of a  
Leiger Book.

A Poor House-keeper may not be a Robbery. Witness for the Hundred in a Robbery, Modern Rep. 73.

Entry and Suspension may be given in Nil debet Evidence upon Nil debet pleaded, Modern Rep. 35. per Twisden, and Browns Case 118.

Fresh Suit may be given in Evidence in an Action of Debt for an Escape on Nil debet pleaded, per Hale and Wild contra Twisden. Hale said he always allowed it, and so said Wild Justice, Modern Rep. 116. Mosedals Case.

One Coparcener not to be Evidence for another in Ejectment, because she claims by the same Title, though not Party to the Suit. But the Daughter of her Sister may be sworn, for although she should be Heir, yet her Mother may give the Lands to whom the Will, being Fee-simple.

Pasc. 13 Car. 2.  
B. R. Truel  
vers. Castell.  
Coparcener.

Ibid. Decree.

A Decree produced in Paper is not to be given in Evidence without Bill and Answer, per Twisden. Otherwise if not in Paper.

Ibid.

A printed Copy of an Act of Parliament is not to be given in Evidence, if not examined by the Rolls and Sworn.

ARs of Parliament.

A private Act that concern'd Rochester-  
Bridge, though printed by Rastal, was not allowed in Evidence, not being examined by the Record. Otherwise of General Statutes, there the printed Book is good Evidence. Lamberts Perambulation, Co. Rep. and F. N. B. are good Evidence, 3 Keeble 91.

King.

Witnesses may be sworn against the King in Criminal Causes, not in Capital, Rex vers. Percival, Hill. 15 and 16 Car. 2. B. R.

Book.  
Crouch and  
Drury, Pasch.  
13 Car. 2. B. R.

A Mans Book of Accounts is no Evidence for the Owner of the Book, but for the adverse Party, for his Book cannot be of better Credit than his Oath, which would not serve in his own Case, Ergo.

Copy.  
Deed.

A Copy of a Deed is good Evidence where the Defendant has the Deed and will not prove it, per Vernon Justice, Clay. Rep. 15. Modern Rep. 4. 266. 2 Keeble 483, 546. Moor 297.

Copy.  
Lease.

Copy of a Counterpart of a Lease, the Lease being lost, given in Evidence and allowed, Mich. 15 Car. 2. Stroud vers. Dr. Holt, B. R.

Deed.  
Seals.

Though the Seals be broken off a Deed, yet the Deed may be given in Evidence, Modern Rep. 11.

Des

Defendant claimed by Patent to Vanlore Patents.  
 in 22 Jac. tot talia tanta &c. (as Dyer) the Tot talia tanta  
 Duke of Somerset, or Abbey of D. had &c.  
 them; And though by way of Pleading a  
 lawful Usage be sufficient, yet on Issue  
 thereon, or in any Evidence it may appear  
 that the Duke or the Abbey had a sub-  
 stantive of bona & catalla Felonum, by Hales  
 Chief Justice and the whole Court: For  
 most Grants of Abbey Lands as these are  
 Relative, and no Substantive Grants ap-  
 pearing, the other Evidence was disallow-  
 ed, especially for that the Duke of Somer-  
 set was attainted, and so his Privileges  
 thereby extinct, unless regranted, 3 Keeble  
 456. in Sandford and Clerks Case, Moor  
 297.

Lamberts Perambulation, Co. Rep. F. N. B. Perambulation  
 are good Evidence. Rastals Statutes are good Statutes.  
 Evidence of General Statutes, but not of  
 private Acts.

Deed with Seals torn off admitted to de- Deed.  
 clare use of a Recovery, Palmers Rep. 403. Seals.  
 See Modern Rep. Tit. Evidence.

Legatee or Devisee of an Annuity may Will.  
 be an Evidence to prove the Will, if he  
 hath received it, or released it; and this  
 though after the Action commenced, Siderf.  
 Rep. 315.

The Cirograph of a Fine may be given Fine.  
 in Evidence, but not given to the Jury; Recovery.  
 but a Recovery may be delivered in Evi-  
 dence, 2 Siderfin 145, 146. Plow. Com. in  
 Scholasticas Case 410.

Recovery in value in Evidence may be  
 given in Evidence, 2 Sid. 145.

Decree

- Decree.** Decree in Chancery is not Evidence at Common Law, 2 Sid. 75.
- Parishioners.** Parishioners may be Witnesses to a Deed, by which a Parish claims Lands to the Relief of the Poor, 2 Sid. 109.
- Bill.** Bill in Equity is no Evidence against the Plaintiff. But
- Equitable Interest.** An Interest in Equity disables a Man to be a Witness, 2 Keeble 345.
- Escape.** Upon a Trial at Bar it was agreed that in Debt upon an Escape, and nil debet pleaded, Repisal upon Fresh Suit may be given in Evidence by the Defendant in excuse of the Action.
- Foreign Attachment.** Custom of Foreign Attachment may be pleaded or given in Evidence, 3 Keeble 221.
- Creditor.** After four Months that a Dividend is made a Creditor is a good Witness, for no other Dividend shall be intended, 3 Keeble 348. Bents and Mico.
- Mic. 22 Car. 1. Continuando.** For making a Trespass Continuando there ought to be a Re-entry of the Plaintiff, and for the not proving thereof, the Plaintiff shall have Damages only for the first Entry.
- Will.** A Will under which a Title to Land is made to the Plaintiff must be shewn it self to the Court, and the Probate it self is not sufficient, 1 Keeble 117. Trial per Pais 215. The same Case cited 2 Roll 678. between Bret and Bret, 10 Car. 1.
- Pasch. 1651. Will.** The Copy of a Will according to the Book of the Register in the Court Christian shall not be admitted to prove a Will of Lands, except the Possession has gone a long time accordingly.

2 Roll 678. adjudged, That Probate of Probate.  
 a Will by Witnesses for Lands is not  
 Evidence at Common Law, although the  
 Probate was good as to the Personal  
 Estate devised, between Bret and Bret, Hill.  
 10 Car. 1.

Upon Plene administravit pleaded, the Ac- Plene Admi-  
 count given to the Ordinary shall not be stravit.  
 given in Evidence, nor any respect to it,  
 2 Roll 678. Turvies Case, Pasch. 7 Jac. per  
 Cur.

Recital of a Patent in another Patent is Recital.  
 no Evidence of the recited Patent, 2 Roll  
 678. Trial per Pais 232, 235. Hardres 323.

If a Witness be convicted of Felony, Mrs. Cellers  
 and afterwards pardoned, whether he shall Case, Pasch. 32  
 be thereby restored to be a good Witness. Car. 2. B. R.  
 And Scrogs Chief Justice, and Raymond  
 Justice were of Opinion that he could not,  
 because the Pardon doth take away the  
 Punishment due to the Offence, but can-  
 not restore the Person to his Reputation;  
 and of that Opinion was Justice Nichols,  
 Moor 872. in Cuddington and Wilkins Case;  
 But Justice Jones and Justice Dolbin cont.  
 And afterwards Raymond was of their Opi-  
 nion: For in Hoberts Reports of Cudding-  
 ton and Wilkins Case its said that the Par-  
 don takes away not only poenam but reatum.  
 Another quære was, Whether a Man con-  
 victed and burnt in the Hand be stigmati-  
 zed as to his Testimony: And Jones Ju-  
 stice held he is not, because the burning  
 in the Hand is no part of his Judgment;  
 and is by 4 H. 7. cap. 13. only to notifie  
 to the Judge that he hath had his Clergy  
 before,

Felons.  
 Pardons.

before, 5 Co. 50. a. Biggins Case. But having examined the Case, do find no Judgment given therein, but compounded as its Reported both 3 Cro. 682. and by Moor 571. and Cro. says there were two Judges against two. And Moor says it was agreed the King could not pardon the burning in the Hand in an Appeal: and in truth it seems to be part of the Judgment; for the Entry is, Ideo consideratum est quod le Offender cauterizetur in manu sua leva. Rast. Entries, 1. b. 56. a. But upon the whole matter it appears by Heston's Case, cited in Foxley's Case, 5 Co. 110. That the burning in the Hand is (by virtue of 18 Eliz. Cap. 6. which saith the Prisoner shall be forthwith enlarged) in the nature of a Pardon.

Trin. 32 Car.  
2. B. R. en  
Count de  
Castlemains  
Case, for in-  
tending to  
kill the King.

Dangerfield was produced as a Witness, who had been found Guilty of several Indictments of Felony for which he had his Clergy, and was burnt in the Hand. And upon other Indictments he had been on the Pillory for cheating, but had obtained his Pardon under the Great Seal for all his said Offences. A Question did arise, whether he might be a Witness: and thereupon the Prisoner did desire to have Counsel assign'd him, and it was granted. And Darnel one of his Counsel urged, that Dangerfield ought not to be a Witness, for he was blemished, and the Pardon had not restored him, and cited 2 Brownl. 47. where it is said, that the King pardoned a Man Attaint for giving a false Verdict, that he shall not be at another time Impannell'd upon a Jury; for though the punishment were pardoned,

doned, yet the guilt remains. 2 Bulstr. 154.  
 Brown versus Crashaw. In a Prohibition,  
 the suggestion was proved only by two per-  
 sons attainted of Felony. And Coke Chief  
 Justice cited Hill. 11 H. 4. 41. b. Pl. 7. That  
 if a Man be attainted of Felony and pardon-  
 ed, he shall not after be sworn upon a Jury,  
 because he is not probus & legalis homo.  
 But the Court willing to be thoroughly satis-  
 fied, sent Justice Raymond to the Court of  
 Common-Pleas to know their Opinion in  
 this point; and the Judges there resolved,  
 That the burning in the Hand was quasi a  
 Statute pardon as to the Felony, and as Clergy.  
 to that he was a good Witness, and the  
 Kings Pardon made him a good Witness as Pardon.  
 to the other Offences; but they said, had he  
 not been burnt in the Hand, the Pardon  
 would not have restored him to his credit  
 again, because in his Testimony the People  
 are concerned, and consequently the Pardon  
 will not deprive them of their Interest.  
 And thereupon the Judges here allowed him  
 to be a good Witness; and with the Opi-  
 nion of the Judges of the Common-Pleas,  
 as to the burning of the Hand agree the  
 Books of 5 Co. 110. a. Heston's Case. Hob.  
 292. and Hob. in Cuddington versus Wilks.  
 But Moor 872. says Justice Nichols was of  
 Opinion, That if the Plaintiff had been  
 convicted, the Judgment would have been  
 otherwise. But Castlemain was found not  
 Guilty on the whole matter.

Upon the Statute of Huy and Cry, at a Robbery.  
 Tryal some Housekeepers appeared as Wit-  
 nesses, that lived within the Hundred, who  
 being

being examined, said they were poor and paid no Taxes or Parish Duties. And the Query was, whether they were good Witnesses: Twilden went down from the Bench to the Judges of the Common-Pleas for their Opinions, who said, Judge Wild was confident that they ought not to be sworn, but Judge Tyrrel doubted, but after was of the same Opinion, because when the Pony is recovered against the Hundred to be levied they might be worth something. Mod. Rep. 74.

Parishioner.

It was held in the Case of Meredith against the Hundred of Warlington, Pasch. 1657. That a Parishioner is not a competent Witness to prove the Bounds of a Parish where he is an Inhabitant, although he pay neither Scot nor Lot, but receives Alms of the Parish, because he is subject to the Watch and Ward, and so is concerned something, though not so much as others: Sty. N. P. R. 571, 572.

Pedigree.

Upon Evidence to a Jury to prove J. S. to be Heir to W. S. the Court would not accept the Pedigree drawn by an Herald at Arms for Evidence, nor would suffer the Jury to have it with them, but 'tis only information for direction. Pasch. 8 Jac. B.R. Sir Edward Plumptre and Robinson. 2 Roll. 687.

Felons.

If one be attainted of Felony and pardoned, he cannot be either Juror or Witness.

Pardon.

Contra per Coke. 2 Bullstr. 154. Brown and Crafhaw. Nor can a Recusant Convict be a Witness, for he is a person Excommunicate. Co.

Excommunicate.

At

At a Commission of Review, in the Case between Bray and Whitehay, concerning the Will of Mr. George Bray of Lincolns-Inn, who gave thereby all his Estate to a Woman he kept, and made her his sole Executrix, and waived his Brother: It was said by Justice Ellis, That it was resolved by the whole Court in the Case of Dutton upon a Tryal at Bar, concerning a Will forged by Mr. Colt, that Depositions taken in Chancery, in perpetuam rei memoriam, upon a Bill for that purpose Exhibited, cannot be given in Evidence at a Tryal at Law, unless there be an Answer put in and produced; and so he said he hath known it several times resolved, both in B. R. and C. B. See Hardres Rep. Wat's Case.

Depositions in  
perpetuam rei  
memoriam.

In an Information against P. That Mich 21 Car. whereas he had cheated one Lee in a Match, 2. B. R. The to the intent that the Lands of this Lee King against should be charged before Marriage, he procured the Feme to acknowledge a Judgment Paris. to him, where in truth no Debt was due by Feme covert. the Feme; in this Case the Feme was admitted a Witness for the King, though the profit of the Husband was collaterally concerned, for by this Evidence if it be found against P. the Judgment shall be set aside.

Trustee.

A Trustee may be a Witness if he release his Trust, so if he be in possession of the Lands in question as Servant. Siderfin 315.

In an Information of Forgery for publishing a forged Deed, importing the revocation of a Will, to the prejudice of the Executors and Legatees; 'twas resolved by all the Trustee. Legatee.

the Barons of the Exchequer, upon conference with the Judges of the Kings-Bench, First, That a Trustee who has conveyed over his Estate in Trust, or has assented thereunto, cannot be a Witness for the King in this Case, nor can a Legatee, nor any other person that is a loser by the Deed, or may receive any advantage by the Verdicts being found for the King. Hardres Rep. 331. Not's Case.

But in Deceit for forging a Will, a Legatee was allowed and sworn as a Witness in the Tryal for the Forgery, for this makes nothing to the probate of the Will, or Recovery of the Legacy in the Spiritual Court, nor do they take notice of it.

*Indeb. assump.  
Account.*

Matters that lye in Account are not to be given in Evidence on an Indebitatus Assumpsit, per North Chief Justice, Modern Rep. 270.

*Payment.*

In an Action of Assumpsit, grounded upon a promise in Law, payment may be given in Evidence, but not where the Action is grounded upon an express promise. Modern Rep. 210.

*Record.*

In Trover for Goods, the proof depended on a Fieri facias, and venditioni exponas, which could not be found on Record, and admitted to be proved in Evidence. Hardres Rep. 323, 324.

*Ejectment.*

A Verdict for a Lessee, is good Evidence for the Reversioner in an Ejectment. Hardres Rep. 472.

Secus in case of Depositions for the Lessee, the Reversioner without being Party to the Suit

Suit can have no advantage, 472, 473.  
ibid.

The Act of general Pardon, cannot be given in Evidence on non debet modo & forma, but ought to be pleaded, for that it is not the general Issue within the intent of the Act. Hardres Rep. 421. *Non debet. General Pardon.*

In an Action on the Case, when the Request is laid at one time in the Declaration, a request at another time may be given in Evidence. Syd. Rep. 268. *Request. Another day.*

It was resolved in one Long's Case, that upon an Information upon the Statute of Usury, the person who borrows the Money may be a Witness after he hath paid the Money, but not before. Mich. 22 Car. 2. B. R. per Twisden Justice. *Usury. Per Twisden Justice, 22 Car. 2. B. R.*

If an ancient Deed of Feoffment be shewn but no Livery upon it, if possession have gone along with the Deed, this is good Evidence to a Jury to find Livery. Roll. 1 Rep. 132. *Feoffment. Livery.*

If a Condition be to pay Money at a certain day and place to avoid a Feoffment, acceptance before the day although he make an Acquittance, doth not maintain the Issue joyned on payment at the day and place. Moor 47. *Payment at the day.*

If A. Indite B. on the Statute 5 Eliz. cap. 9. of Perjury, as a party grieved, the prosecutor cannot be a Witness against B. Roll 685. 2 part. *Perjury. Prosecutor.*

Evidence may be given to mitigate Damages, in all cases where Damages are to be recovered, as in Mass, that the Premises were ruinous at the time, &c. or burnt

R

by

by Enemies, &c. See Olive and Gwin's Case in Siderfin 2 part, 145. in the Exchequer, good matter concerning Evidence, where 'twas adjudged, that a Record had in Brecknock in Wales, under the Seal of Brecknock, might be given in Evidence. See Hardres Rep. 118.

Perjury.

Judgment stayed, because the Verdict was laid upon the testimony of one Witness, and he since convicted of Perjury in the same thing. Pas. 17 Car. 2. B. R.

Two Witnesses.

There ought to be two, where the Tryal is by Witnesses.

## C A P. XII.

The Juries Oath; why called Recognitors in an Assise, and Jurors in a Jury. Of the Tryal *per medieta-tem linguæ*; when to be prayed and when grantable. Of a Tryal betwixt two Aliens, by all English. Of the *Venire facias*, *per medieta-tem linguæ*, and of Challenges to such Juries.

Assise, Enquest and Proof, are taken for the word Jury. Vide 28 E. 3. 13.

**T**HE Jury having heard their Evidence, let them now consider of their Verdict: But first they must remember their Oath, which in effect is, To find according to their Evidence, and therefore they should have had

had it before the Evidence, but that the form and order of the Venire facias (which I have tyed my self to follow) leads me to it after their Evidence, in these Words, Ad faciend. See Chap. 1. quendam Juratam; I have already shewed the derivation of this Word Jurata, and what is the legal acceptation of it; only observe with our Great Master Littleton, 1 Inst. 154. That the Word Assise is sometimes taken for a Jury, so as the Learned Commentator doth well Paraphrase, That the Word Assise is Nomen Equivocum Equivocans, because sometime it signifieth a Jury, sometime the Writ of Assise, and sometime an Ordinance or Statute; but Jurata, is Nomen Equivocum Equivocatum, because we always understand that Word (according to the aforesaid definition) to be a Jury of Twelve Men, so called, by reason of the Oath they take, Truly to try the Suit of Nisi prius, between Party and Party, according to their Evidence.

Assisa for Jurata.

The Juries Oath.

And as in an Assise, the Jurors are called Recognitors, from these words in the Writ of Assise, facere Recognitionem; so upon a Nisi prius, they are called Juratores, from these words in the Venire facias, Ad faciend. quendam Juratam.

Why called Recognitors in an Assise, and Jurors in a Jury.

In ancient time, the Jury, as well in 12 Knight. Common Pleas, as in Pleas of the Crown, were twelve Knights, as appears by Glanvil, Lib. 2. Cap. 14. and Bracton, f. 116.

The next words of the Venire facias, are Inter partes prædictas. In the fourth Chapter, I have instanced, That in some Cases, a Jury shall be awarded betwixt the party,

and a stranger to the Writ and Issue; I will now shew what the Jury shall be, when one of the parties is an Alien, the other a Denizen; and when both parties to the Issue are Aliens.

*Jury per medietatem linguæ.*

Keeble 2 part  
315.

This Tryal is called in Latin, *Triatio bilinguis*, or *per medietatem linguæ*. And this Tryal by the Common Law was wont to be obtained of the King, by his Grant made to any Company of Strangers, as to the Company of Lombards or Almaines, or to any other Company, that when any of them was impleaded, the moyety of the Inquest should be of their own Tongue. Stanf. Plea, Cor. Lib. 3. Cap. 7.

Its Antiquity.

And this Tryal in some Cases, *per medietatem linguæ*, was before the Conquest, as appears by Lamb. f. 91, 3. *Viri duodeni Jure consulti, Angliæ sex, Walliæ totidem, Anglis & Wallis jus dicanto*. And of ancient time, it was called *Duodecimvirale Judicium*. 1 Inst. 155.

But afterwards this Law became universal: First by the Statute of 27 Ed. 3. Cap. 8. It was Enacted, That in Pleas before the Mayor of the Staple, if both Parties were Strangers, the Tryal should be by Strangers. But if one party was a Stranger and the other a Denizen, then the Tryal should be *per medietatem linguæ*. But this Statute extended but to a narrow compass, to wit, only where both parties were Merchants or Ministers of the Staple, and in Pleas before the Mayor of the Staple: But afterwards, in the twenty eighth year of

of the same Kings Reign, Cap. 13. It was Enacted,

That in all manner of Enquests and Proofs, which be to be taken or made amongst Aliens, and Denizens, be they Merchants or other, as well before the Mayor of the Staple, as before any other Justices or Ministers, although the King be Party. The one half of the Enquest or Proof shall be Denizens, and the other half Aliens, if so many Aliens and Foreigners be in the Town or Place, where such Enquest or Proof is to be taken, that be not Parties, nor with the Parties in Contracts, Pleas, or other Quarrels, whereof such Enquest or Proof ought to be taken: And if there be not so many Aliens, then shall there be put in such Enquests or Proofs, as many Aliens, as shall be found in the same Towns or Places, which be not thereto Parties, nor with the Parties, as aforesaid is said, and the Remnant of Denizens which be good Men, and not suspicious to the one Party, nor to the other.

So that this is the Statute which makes King. the Law universal, concerning the medieta-tem linguæ; for though the King be party, yet the Alien may have this Tryal. And it matters not, whether the movery of Aliens be of the same Country as the Alien party to the Action, is: for he may be a Portugal and they Spaniards, &c. because the Statute speaks generally of Aliens. See Dyer 144.

*Venire facias,  
p r medietatem  
lingua.*

And the form of the *Venire facias* in this Case is *De vicinet. &c. Quorum una medietas sit de Indigenis, & altera medietas sit de alienigenis natis, &c.* And the Sheriff ought to return twelve Aliens and twelve Denizens one by the other, with addition which of them are Aliens, and so they are to be sworn. But if this Order be not observed, it is holpen as a mis-return, by the Statute of 18 Eliz. Cro. 3 part, 818, 841. So that Brook says, it is not proper to call it a Tryal, *per medietatem linguæ*, because any Aliens of any Tongue may serve. But under his favour I think it proper enough.

For People are distinguished by their Language, and *Medietas Linguæ*, is as much as to say, half English and half of another Tongue or Country whatsoever. Though it be not material of what sufficiency the Jurors are, yet the form of the *Venire facias*, shall not be altered, but the Clause of *Quorum quilibet habeat, 4 l. &c.* shall be in, Cro. 3 part, 481.

But suppose that both parties be Aliens, of whom shall the Inquest be then? It is resolved, that the Inquest shall be all English; for though the English may be supposed to favour themselves more than Strangers, yet when both parties are Aliens, it will be presumed they favour both alike, and so indifferent. 21 H. 6. 4. But if the Plea be before the Mayor of the Staple, and both parties Alien Merchants of the Staple, it shall be tryed by all Aliens. Stamford's Pleas del Corone, 159. A Scotchman is a Subject  
and

and shall not have this Tryal. Egyptians are also excluded, when tryed for Felony made by the Statute against them, 1 Phil. and Mar. Cap. 4. 5 Eliz. Cap. 20.

Where an Alien is party, yet if the Tryal be by all English, it is not erroneous, because it is at his peril, if he will slip his time, and not make use of the advantage which the Law giveth him when he should. Dyer 28. All English.

The Alien ought to pray a Venire facias, When the per medietatem linguæ, at the time of the awarding the Venire facias: But if he doth it at any time before a general Venire facias be returned and filed, the Court may grant him a Venire facias de novo. Dyer 144. 21 H. 7. 32. though it hath been questioned. When the Alien should pray a Venire facias per medietatem.

But if he hath a general Venire facias, he cannot pray a Decem Tales, &c. per medietatem linguæ, upon this; because the Tales ought to pursue the Venire facias. 3 E. 4. 11, 12. And so if the Venire facias be per medietatem linguæ, the Tales ought to be per medietatem linguæ; as if six Denizens and five Aliens appear of the principal Jury, the Plaintiff may have a Tales, per medietatem linguæ, Li. 10. 104. But if in this case the Tales be general, de circumstantibus, it hath been held good enough; for there being no exception taken by the Defendant, upon the awarding thereof, it shall be intended well awarded. Cro. 3 part, 818, 841.

Where the  
Tryal of an  
Aliens cause  
shall be by  
English.

Part English  
and part  
Aliens.

Challenge.

When the  
Alien should  
pray a *Venire  
facias per me-  
diatatem.*

If the Plaintiff or Defendant be Executor or Administrator, &c. though he be an Alien, yet the Tryal shall be by English, because he sueth in autre droit; but if it be averred that the Testator or Intestate, was an Alien, then it shall be per medietatem linguæ, Cro. 3 part, 275.

Mich. 40 and 41 Eliz. The Queens Attorney exhibited an Information against Barre, and divers other Merchants, some whereof were English, and some Aliens: After Issue, the Aliens prayed a Tryal per medietat. Linguæ. But all the Justices of England resolved, That the Tryal should be by all English, and likened it to the Case of Privilege, where one of the Defendants demands Privilege, and the Court, as to his Companion cannot hold Plea, there he shall be ousted of his Privilege, sic hic. More 557.

By the Statute of 8 H. 6. Cap. 29. Insufficiency or want of Freehold is no cause of Challenge to Aliens, who are impaneled with the English, (notwithstanding Stamford's Opinion, Pl. Coron. 160.) for this Statute saith, That the Statute 2 H. 5. 3. shall extend only to Enquests betwixt Denizen and Denizen.

If the Defendant do not inform the Court that he is an Alien, upon awarding of the Venire facias, and so pray a Venire facias per medietatem linguæ; he cannot challenge the Array for this cause at the Tryal, if the Jury be all Denizens (notwithstanding Stamford's Opinion to the contrary, and the Books cited by him, fol. 159. Pl. Cor.)

For

For the Alien at his peril should pray a Venire facias, per medietatem linguæ. Dyer 357. Vide Rolls tit. Tryal 643.

If the Plaintiff be an Alien, he must suggest it before the awarding of the Venire facias; but if the Defendant be an Alien, the Plaintiff is allowed to surmise that, before or after the Venire facias, because the Defendants quality may not be known to him before. 27 H. 7. 32.

If the Defendant be an Alien, on notice given by his Attorney, to the Plaintiff or his Attorney, the Plaintiff ought to enter it on the Roll, to have a Tryal de medietate at his peril; but the Court refused to award it for the Defendant, on his Affidavit that he is an Alien, Keeble 1 part, 547.

## C A P. XIII.

The Learning of General Verdicts, Special Verdicts, Privy Verdicts, and Verdicts in open Court; and where the Inquest shall be taken by default. Inquests of Office, &c. Arrest of Judgment, Variance betwixt the Nar. and the Verdict, &c.

Verdict.

**V**ERDIT or Verdict; In Latin, Vere dictum, quasi dictum veritatis, as Judicium, est quasi Juris dictum; Is the Answer and Resolution of those twelve Men, concerning the matter of Fact referred to them by the Court, upon the Issue of the Parties. And this is the foundation upon which the Judgment of the Court is built, for ex facto jus oritur; the Law ariseth from the Fact; wherefore it is no wonder, that the Law hath ever been so curious and cautious, as not to believe the matter of Fact, until it is sworn by twelve sufficient Men of the Neighbourhood where the Fact was done, whom the Law supposeth to have most cognizance of the truth or falsehood thereof, which being sworn (for the words are, Juratores predicti dicunt super sacrum suum, &c.) is the Verdict whereof we now treat: And such credit doth the Law give to Verdicts, that no proof will be admitted

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ted to impeach the verity thereof, so long as the Verdict stands not reversed by Attaint. And therefore upon an Attaint, no Superedeas is grantable by Law. Plo. Com. 496.

And it is worth our Observation, that the Law seems to take more care of the Fact, than of her self; for the major part of the Judges give the Judgment of the Law, though the other Judges dissent. But every one of the twelve Jurors must agree together of the Fact, before there can be a Verdict, which must be delivered by the first Man of the Jury. 29 Assises. Pl. 27.

And this Verdict is of two kinds, viz. General or one general, and the other special, or at special large.

The general Verdict is positively, either in the Affirmative or Negative, as in Trespass, upon Not Guilty pleaded; the Jury find Guilty or Not Guilty; and so in an Assise of Novel disseisin, brought by A. against B. the Plaintiff makes his plaint, Quod B. disseisivit eum de 20 acris terræ, cum pertinentiis: The Tenant pleads, Quod ipse nullam injuriam seu disseisinam prefato. A. inde fecit, &c. The Recognitors of the Assise do find, Quod predict. B. injuste & sine judicio disseisivit predict. A. de predict. 20 acris terræ cum pertinentiis, &c. This is a general Verdict. 1 Inst. 228.

A special Verdict, or Verdict at large is so called, because it findeth the special matter at large, and leaveth the Judgment of the Law thereupon, to the Court; of which kind of Verdict it is said, Omnis Conclusio boni Special Verdict.

1 Inst. 226.

boni & veri iudicii sequitur ex bonis & veris premissis, & dictis Juratorum. And as a Special Verdict may be found in Common Pleas, so may it also be found in Pleas of the Crown, or Criminal Causes that concern life or member.

The Court cannot refuse it.

A special Verdict may be found upon any Issue, as upon an *absq; hoc*, &c.

And it is to be observed, that the Court cannot refuse a Special Verdict, if it be pertinent to the matter in Issue. 1 Inst. 228.

It hath been questioned, whether the Jury could find a Special Verdict, upon a special point in Issue, or no, as they might upon the general Issue. But this question hath been fully resolved in many of our Books; first in Plo. Com. 92. It is resolved, That the Jury may give a special Verdict, and find the matter at large, en chescun issue en le monde, so that the matter found at large, tend only to the Issue joyned, and contain the certainty and verity thereof. Lib. 9. 12.

And in 2 Inst. 425. upon Collection of many Authors, it is said, That it hath ben resolved, that in all Actions, real, personal and mixt, and upon all Issues joyned, general or special, the Jury might find the special matter of fact, pertinent, and tending only to the Issue joyned, and thereupon pray the discretion of the Court for the Law. And this the Jurors might do at Common Law, not only in Cases between party and party, but also in Pleas of the Crown, at the Kings Suit, which is a proof of the Common Law. And the Statute of Westminster, the 2. Cap. 30. is but an affirmative of the Common Law.

And

And as this special Verdict is the safest for the Jury, 1 Inst. 228. so in many Cases it is most advantageous to the party, and helps him where his own pleading cannot. As for Example, saith Littleton, Sect. 366, 367, 368. Albeit a man cannot in any Action plead a condition, which toucheth and concerns a Freehold, without shewing writing of this; yet a man may be aided upon such a condition, by the Verdict of twelve Men, taken at large in an Assise of Novel disseisin, or in any other Action, where the Justices will take the Verdict of twelve Jurors at large: As put the Case, a Man seised of certain Land in Fee, letteth the same Land to another, for term of life, without Deed, upon condition to render to the Lessor a certain Rent, and for default of payment, a Reentry, &c. By force whereof the Lessor is seised as of Freehold; and after, the Rent is behind, by which the Lessor entreateth into the Land, and after the Lessor arraigns an Assise of novel disseisin of the Land against the Lessor, who pleads that he did no wrong nor Disseisin. And upon this, an Assise is taken. In this Case, the Recognitors of the Assise may say, and render to the Justices their Verdict at large, upon the whole matter; as to say that the Defendant was seised of the Land in his Demesne as of Fee, and so seised, let the same Land to the Plaintiff for term of his Life, rendering to the Lessor such a yearly Rent, payable at such a Feast, &c. Upon such Condition, that if the Rent were behind at any such Feast, at which it ought to be paid, then it should be

A Free-hold upon Condition, without Deed, may be found by Verdict, though it cannot be pleaded.

be lawful for the Lessor to enter, &c. By force of which Lease the Plaintiff was seized in his Demesne as of Freehold, and that afterwards, the Rent was behind at such a Feast, &c. By which the Lessor entered into the Land, upon the possession of the Lessee. And pray the discretion of the Justices, if this be a Disseisin done to the Plaintiff or not. Then for that it appeareth to the Justices, that this was no Disseisin to the Plaintiff, insomuch as the entry of the Lessor was congeable on him, the Justices ought to give Judgment, that the Plaintiff shall not take any thing by his Writ of Assise, and so in such case the Lessor shall be aided, and yet no writing was ever made of the Condition: For as well as the Jurors may have consulance of the Lease, they also may as well have consulance of the condition, which was declared and rehearsed upon the Lease.

In the same manner it is of a Feoffment in Fee, or a Gift in Tail, upon Condition, although no Writing was ever made of it. And as it is said of a Verdict at large, in an Assise, &c. In the same manner it is of a Writ of Entry, founded upon a Disseisin, and in all other Actions where the Justices will take the Verdict at large, there where such Verdict at large is made, the manner of the whole Entry is put in Issue.

But in Assise of Rent it cannot be found to be upon Condition, unless they also find the Dæd of the Condition.

So of a Confirmation in Fee to Lessee for years.

Per Hale Chief Justice, Guild-Hall, Hill. 671. A special Verdict may be found as to Damages in an Action of the Case; as the Case was there, Viz. Pro Quer', and if so, &c. then such Damages; if so, &c. then Damages such; and he said, he had known it so done in Debt, and the Damages three ways.

Also in such Case, where the Enquest may give their Verdict at large, if they will take upon them the knowledge of the Law upon the matter, they may give their Verdict generally, as is put in their charge, as in the Case aforesaid, they may well say that the Lessor did not disseise the Lessee, if they will, &c.

General Verdict.

*Note* the Court cannot refuse a general Verdict, if the Jury will find it, as was held before Justice Windham, Lent As.

ises, 1681. In *Verdons* Case at Cambridge.

The Jury may likewise find Estoppel, which cannot be pleaded as in the second Report, f. 4. it well appears, where one Goddard, Administrator of James Newton, brought an Action of Debt against John Denton, upon an Obligation made to the Intestate, bearing date the 4th day of April, Anno 24 Eliz. The Defendant pleaded, that the Intestate dyed before the date of the Obligation, and so concluded that the said Escrip was not his Deed, upon which they were at Issue.

And the Jury found that the Defendant delivered it as his Deed, 30th July, Anno 23 Eliz. and found the Tenor of the Deed in  
hac

hæc verba, Noverint Universi, &c. Dat. 4 Aprilis, Anno 24 Eliz. And that the Defendant was alive 30 July, Anno 23 Eliz. And that he dyed before the said date of the Obligation, and prayed consideration of the Court, if this was the Defendants Deed: And it was adjudged by Anderson Chief Justice, Windham, Periam and Walmesley, That this was his Deed, and the reason of the Judgment was, that although the Obligee in pleading cannot alledge the delivery before the date, as it is adjudged in 12 H. 6. 1. Which Case was affirmed to be good Law, because he is estopped to take an avermeent against any thing expressed in the Deed; yet the Jurors who are sworn ad veritatem dicend. shall not be estopped. For an Estoppel is to be concluded to speak the truth, and therefore Jurors cannot be estopped, because they are sworn to speak the truth.

*Note,* That a Deed may be pleaded to be delivered after the date, but not before, because it shall not be intended written before the date, which may be after the date.

12 H. 6. 1. As in Waste supposed in *A.* to plead that *A.* is a Hamlet in *B.* and not a Town of it self, admitteth the Waste, &c. 9 H. 6. 66. and the Jury cannot find no Waste, for that would be against the Record.

Estoppel.  
Cro. 1 part  
110. Lib. 4. 53.

But if the Estoppel or Admittance, be within the same Record in which the Issue is joyned, upon which the Jurors give their Verdict, there they cannot find any thing against this, which the parties have affirmed, and admitted of Record, although it be not true; for the Court may give Judgment upon a thing confessed by the parties, and the Jurors are not to be charged with any such thing, but only with things in which the parties vary. Ib. Lib. 5. 30.

So Estoppels which bind the Interest of the Land, as the taking of a Lease of a Mans own Land, by Deed indented, and the like, being specially found by the Jury, the Court

Court ought to judge, according to the special matter ; for albeit Estoppels regularly must be pleaded and relyed upon, by apt conclusion ; and the Jury is sworn ad veritatem dicend. yet when they find veritatem facti, they persue well their Oath, and the Court ought to judge according to Law. So may the Jury find a Warrant being given in Evidence, though it be not pleaded, because it bindeth the right, unless it be in a Writ of Right, when the Mife is joyned upon the meer right. 1 Inst. 227. Warranty not pleaded.

Verdicts ought to be such, that the Court may go clearly to Judgment thereon, and therefore Verdicts finding matter uncertainly, or ambiguously, are insufficient and void, and no Judgment shall be given thereupon. As if an Executor plead Plene Administravit, and Issue is joyned thereon, and the Jury find that the Defendant hath Goods within his Hands to be administered, but find not to what value, this is an uncertainty, and therefore an insufficient Verdict. Lib. 9. 74. 1 Inst. 227. Uncertain Verdicts.

In all special Verdicts, the Judges will not adjudge of any matter of Fact, but this which the Jury declare to be true of their own finding. And therefore the Judges will not adjudge upon an Inquisition, or aliquid tale found at large in a special Verdict, for their finding of this is not an affirmation, that all which is in this is true. Siderfin 2 part, 86. Special Verdicts.

It is the Office of the Jurors, to shew the verity of the Fact, and leave the Judgment of the Law to the Court. And therefore The Office of the Jury.  
S upon

upon an Indictment of Murder, Quod felonice percussit, &c. If the Jury find percussit tantum, yet the Verdict is good, for the Judges of the Court are to resolve upon the special matter, whether it was felonice, and so Murder, or not, Lib. 9. 69. And if the Court adjudge it Murder, then the Jurors in the conclusion of their Verdict, find the Felon Guilty of the Murder contained in the Indictment.

Verdict finding part of the Issue.

More 406.

Finding more than the Issue.

Where fatal. Siderfin 96. Keeble 1 part, 289.

A Verdict that finds part of the Issue, and finding nothing for the rest, is insufficient for the whole, because they have not tryed the whole Issue wherewith they are charged: As if an Information of intrusion be brought against one, for intruding into a Messuage and an hundred Acres of Land: upon the general Issue, the Jury find against the Defendant for the Land, but say nothing for the Houle, this is insufficient for the whole.

But if the Jury give a Verdict of the whole Issue, and of more, &c. that which is more is surplusage, and shall not stay Judgment: For Utile per inutile non vitiatur. Leon. 1 part, 66. Cro 1 part, 130. But necessary incidents required by Law, the Jury may find. Siderfin 232.

If the Issue be upon a discent, and the Jury find the same, and a continual claim, that as to the continual claim is surplusage, 7 H. 6. 8, 9, 20.

In some Cases the Verdict may be found for the Plaintiff, and yet he shall be barred.

As 40 Ass. 6. in a Mortdancester, all the points of the Writ found for the Plaintiff, and yet he was barred for this reason, for although he was Heir to his Father, yet because the elder Brother by the half blood did enter, he was barred.

Yet in many Cases, nay almost in all, the Jury ought to find more than is put in Issue, otherwise their Verdict is not good; and therefore they are to assess Damages and Costs, because it is parcel of their charge, as a consequent upon the Issue, though it be not part of the Issue in terminis, Lib. 10. 119.

Where the Verdict ought to be of more than is in the Issue.

A Verdict must be sufficient in matter and form, be the same special or general, and therefore they must lay Damages and Costs where the same ought to be found.

An Action of the Case on Deceit was brought, for that he sold unto the Plaintiff two Oxen, and warranted them to be sound; on not Guilty, the Jury found him Guilty as to one, and not Guilty to the other, and good; for that the Action was founded not on the Contract, but the Deceit. 3 Cro. 884. Gravenor and Mete.

In Debt the Plaintiff declares that he had Judgment against Baron and Feme for a Debt of the Wives, dum sola, &c. that they were in Execution and suffered to Escape, the Jury found the Husband only in Execution and escaped, and Judgment for the Plaintiff. Roberts versus Herbert, Hill. 12 Car. 2. C. B.

Damages by  
the first In-  
quest.

So in Trespals against two, one comes and pleads Not Guilty, and is found guilty. In this Case, the first Inquest shall assess Damages for the whole Trespals, by both Defendants; and afterwards the other comes and pleads Not Guilty, and is found guilty: The finding of Damages by the first Inquest, to which he was not party, shall bind him; and therefore if the Damages are outrageous, and excessive, the Defendant in the last Enquest shall have an Attaint. Lib. 10. 119.

Attaint.

So in Trespals, Quare clausum fregit, if Issue be joyned upon a Feoffment, and the Jury give outrageous Damages, an Attaint lies; for the inquiry of Damages is consequent and dependent upon the Issue, and parcel of their charge. Ibid.

Damages by  
the first In-  
quest.

In the 11th Report, fo. 5. It was resolved, That in Trespals against two, where one comes and appears, &c. against whom the Plaintiff declares with a simul cum, &c. who pleads and is found Guilty, and Damages assessed by the Enquest, and afterwards the other comes and pleads, and is found Guilty; The Defendant which pleaded last shall be charged with the Damages taxed by the first Inquest; for the Trespals which the Plaintiff had made joyned by his Writ and Count, and done at one time, cannot be severed by the Jurors, if they find the Trespals to be done by all, at one and the same time as the Plaintiff declared.

So in the Trespals against divers Defendants, if they plead Not Guilty, or several Pleas, and the Jury find for the Plaintiff in all, the Jurors cannot assess several Damages against the Defendants, because all is but one Trespals, and made joyn't by the Plaintiff by his Writ and Count. And although that one of them was more malicious, and de facto, did more and greater wrong than the others, yet all came to do an unlawful act, and were of one party, so that the act of one, is the act of all, of the same party being present. But in Trespas against two, if the Jurors find one guilty at one time, and the other at another time, there several Damages may be taxed. But if the Plaintiff bring an Action of Trespals against two, and declare upon a several Trespals, his Action shall abate. And this is the diversity between the finding of the Jury, and the confession of the party.

Several Damages.  
Vide Devant cap. 4.

And in Trespals, where the Defendants plead several Pleas, all tryable by one Jury, and they find generally for the Plaintiff, the Jurors cannot sever the Damages; if they do, their Verdict is vicious.

If the Declaration be of several Damages, touching every part in several, the Verdict ought to find the Damage several, as the Declaration is.

Detinue.

So in Waste, for every several part waste.

So in a Premunire, against the principal and accessory.

Premunire.

Forcible Entry.

So in a forcible Entry, where some are found to detain forcibly, and others to enter forcibly.

Trespas.

If one be found guilty of several trespasses, the Damages may be entire.

Jeofail.

If one of the Issues be a Jeofail, and the Damages intirely assessed, 'tis ill in both.

Cost.

But Cost in these Cases must be intire.

Judgment de melioribus dampnis.

But in Trespas against two, where one appears and pleads not Guilty to a Declaration against him, with a simul cum, &c. and afterwards the other appears and pleads not Guilty to a Declaration against him also, with a simul cum, &c. Whereupon two Venire fac. issue out, and one Issue tries after the other, and several Damages assessed: in Judgment of the Law, the several Juries give one Verdict, all at one time, and the Plaintiff hath his Election to have judgment de melioribus dampnis, by any of the Inquests. And this shall bind all, but fiat nisi una Executio.

Damages.

It is a Maxim, That in every Case where an Inquest is taken by the Mile of the parties, by the same Inquest shall Damages be taxed for all. And in Mich. 39 H. 6. f. 1. In an Action of Trespas against many, (who pleaded in Bar the Term before) and one of them made default, which was Recorded: There it is resolved by all the Court, That for saving of a Discontinuance, a Writ of Inquiry of Damages shall be awarded; but none shall issue out, because he shall be contributory to the Damages taxed by the Inquest,

Writ of Inquiry.

Quest, at the Mise of the parties, if it be found for the Plaintiff: and if it be found against the Plaintiff, then the Writ of Enquiry shall issue forth.

And the reason wherefore no Writ shall issue out at first, to enquire of Damages, until, &c. is, because that if a Writ should issue out, and be executed, this is nothing but an Inquest of Office, and not at the Mise of the parties, and yet this Inquiry (if it might be allowed) ought to serve for all the Damages; for inquiry of Damages shall not be twice, and the others which have pleaded to Inquests if the Issue be found against them, shall be chargable to those Damages which are found by the Inquest of Office, and if they be excessive they shall have no remedy, although there be no default in them; for they cannot have an Attaint, because it is but an Inquest of Office.

So in Trespass or assumpsit against two, if one confess the Action, or let it go by nil dic. and the other plead, the Jury upon the Issue shall assess the Damages against both. Keeble 1 part, 623.

But in Trespass against two, who plead **Not Guilty**, &c. severally; and several Venire facias awarded, the Inquest which first passes, shall assess Damages for all, and the second Inquest ought not to assess Damages at all, but that the Defendant shall be contributory to the Damages assessed by the first Jury, notwithstanding he is not party to it; yet if these Damages be excessive, he shall have an Attaint;

Damages by the first Inquest.

(because though he is a stranger to the Issue, yet in Law, he is privy in Charge.) And so no Damage or Mischief can accrue to him in this Case.

Verdict, when  
to be supplied,  
by Writ of In-  
quiry, &c.

*Vide hic.*  
*cap. 6.*

Now let us see when something is left out of the Verdict, which the Jury ought to have inquired of, whether it may be supplied by matter ex post facto; and how: And for this, know, That if Damages be left out of a Verdict, this omission cannot be supplied by Writ of Inquiry of Damages: for this would prevent the Defendant of his remedy by Attaint, which would be very mischievous; for then such omission might be on purpose, to deprive the Plaintiff of his Attaint, Lib. 10. 119.

And the Rule is, That when the Court ex officio, ought to inquire of any thing, upon which no Attaint lies, there the omission of this, may be supplied by a Writ of Inquiry of Damages: as in a Quare Impedit, if the Jury omit to enquire of these four things, that, that is to say, de plenitudine, ex cujus presentatione, si tempus semestre transierit, and the value of the Church per annum, there the Plaintiff may have a Writ to inquire of these points. Dyer 241. 260. because of these no Attaint lies, as it is holden in 11 H. 4. 80. because that as to these, the Inquest is but of Office. But in all Cases, where any point is omitted, whereof no Attaint lyeth, there this shall not be supplied by Writ of Inquiry, upon which no Attaint lyeth. And therefore in Detinue, if the Jury find Damages and Cost, and no Value as they ought, this shall not

Keeble 1 part,  
382.

not be supplied by Writ of Inquiry of Damages, for the reason aforesaid. 1b. Et sic in similibus.

The Plaintiff was Non-suit. And upon In Replevin. the Statute 17 Car. 2. 7. the Jury inquired of the value of the Cattel, scil. 55 l. and 12 d. But they did not inquire what Rent was arrear: and it was moved to supply it by a new Writ of Inquiry, as in a Quare Impedit; but 'twas answered, that the Statute says, in case of a Non-suit, The same Jury shall enquire of the value of the Cattel, and the Rent Arrear. Syderfin 380. Keeble 2 part, 409.

A Verdict upon an Issue of misnomer, Abatement. pleaded in abatement, is peremptory, and Costs, if the Jury omit to find Costs, they cannot be supplied by a Writ of Inquiry, &c. Keeble 2 part, 545.

But how then? What, shall the Plaintiff lose the benefit of his Verdict, because the Jury assessed no Damages (or did insufficiently assess them?) Certes in such Cases where Damages only are to be recovered, he must lose the whole benefit of his Verdict; but where any thing else is to be recovered, besides Damages, as in Debt, Ejectment, &c. he may release his Damages, and have Judgment upon his Verdict as to the rest. And so where Damages are to be recovered, if part of them are assessed insufficiently, and part well, he may have Judgment for those Damages well assessed. And oftentimes the insufficiency of the Declaration shall set aside the Verdict; as if in an Action upon the Case be brought upon two  
 Verdict set aside, because the damages not well assessed.  
 Release Damages.  
 Carters Rep. 51.  
 Verdict set aside in part. For insufficiency in the Declaration.

promises, and one of them be insufficiently laid, and the Verdict give intire Damages this is naught for the whole; but if the Damages had been severally assessed upon the several promises, then the Verdict as to the promise well laid, should have stood. *Li. Rep.* 61. *Keeble* 2 part, 488.

Release of Damages where none were assessed:

In the 11th Report, f. 56. *Marsh* brought a Writ of Annuity against *Bentham*, and the parties descended to Issue, which was tryed for the Plaintiff, and the Arrearages found, &c. But the Jurors did not assess any Damages or Cost; which Verdict was insufficient, and could not be supplied by Writ of Inquiry of Damages: wherefore the Plaintiff released his Damages and Costs, and upon this had Judgment: upon which the Defendant brought a Writ of Error, and assigned the Error aforesaid, scilicet the insufficiency of the Verdict, sed Judicium affirmatur, because the Plaintiff had released his Damages and Costs, which is for the benefit of the Defendant.

In *Detinue* of Charters, or non detinet, Verdict for the Plaintiff and Damages, but the Jury did not find the value of the Wards, and a Writ of Inquiry was awarded to that purpose and returned, and ruled good; and by *Twisden* Justice, Debt against *Crecutor*, who pleads plene, &c. And it's found against him, and the Jury give no Damages, that can't be aided by Writ of Inquiry. *Burton* versus *Robinson*, *Pasch.* 17 *Car.* 2. *B. R.*

In Dyer 22 Eliz. 369, 370. In a Writ of Ejectione Custodiæ terræ & hæredis, the Jurors assessed Damages intirely, which was insufficient; for it lay not for the Heir, yet the Plaintiff released his Damages, and had Judgment for the Land: And Note, That insufficient assessment of Damages, and no assessing is all one.

Release of Damages where they were not well assessed.

The Jury ought to assess no more Damages pro injuria illata, than the Plaintiff declares for: but they may assess so much, and moreover give Costs, which is called Expensæ litis; though in the proper and general signification Dampnum also comprehends Costs of Suit, as the Entry reciting both Damages and Costs, well affirms, scil. Quæ dampna in toto se attingunt cum, &c.

Damages and Costs.

But if the Jury do assess more Damages than the Plaintiff declares for, the Plaintiff may remit the over-plus, and pray Judgment for the residue, as in the 10th Report, f. 115. In Trespas the Plaintiff declared ad dampnum, &c. 40 l. at the Tryal the Jury assessed Damages occasione transgressionis predict. ad 49 l. And for Costs of Suit 20 s. Upon which Verdict the Plaintiff at the day in Bank, remitted 9 l. parcel of the said 49 l. assessed for Damages, and prayed Judgment for 40 l. (to which Damage he had counted) with increase of Costs of Suit, and had 9 l. de incremento, added by the Court, which in all amounted to 50 l. and had his Judgment accordingly: upon which a Writ of Error was brought, and the Judgment affirmed.

More Damages than the Plaintiff declares for.

Damages remitted.

Damages in  
real and per-  
sonal Actions.

Damages and  
Costs intirely  
assessed.

For as in real Actions, the Demandant shall not count to Damages, &c. because it is incertain to what sum the Damages will amount, by reason he is to recover Damages pendant le briefe; so in the case of Costs, he shall recover for the expences depending the suit, which being uncertain, cannot be comprehended in the Count, because the Count extends to Damages past, and not to expences of suit. For in personal Actions he Counts to Damages, because he shall recover Damages only for the wrong done, before the Writ brought, and shall not recover Damages for any thing, pendant le briefe. But in real Actions, the Demandant never Counts to Damages, because he is to recover Damages also, pendant le briefe, which are incertain.

The Jury may if they will, assess the Damages and Costs intirely together, without making any distinction. 18 E. 4. 23. But then they must not assess more Damages and Costs, than the Damages are which the Plaintiff counts to; for if they do, the Plaintiff shall recover only so much as he hath declared for, without any increase of Cost, because the Court cannot distinguish how much they intended for Cost, and how much for Damage.

As in 13 H. 7. 16, 17. One Darrel brought a Writ of Trespass, and counted to his damage twenty Marks, the Defendant pleaded Not Guilty, and the Jury taxed the damages and costs of suit jointly to twenty two Marks, and the Verdict was held to be good for twenty Marks, and void for the  
res

residue, because it doth not appear how much was intended for damages, and how much for costs, so that there may be more damages than the Plaintiff declared for, or less, and so the Court knows not how to increase the Cost; wherefore he shall have Judgment but for twenty Marks, by reason of the incertainty.

Where a special Verdict is not entered according to the Notes, the Record may be amended and made agree with the Notes at any time, though it be three or four, &c. Terms after it is entered, Lib. 4. 52. Lib. 8. 162. Cro. 1 part, 145.

Verdict amended by the Notes.

In the Case of Turnor and Thalgate, Mich. 1658. B. R. It was said Per Cur<sup>3</sup> That special Verdicts may be amended by the Notes, but the Notes cannot be amended or enlarged by any Averment or Affidavit, for that were to find a Verdict by the Court. Yet in that Case, where the Notes were, That the Judgment, &c. was vacated prout per Rule, the Verdict was amended, vacated per Cur<sup>3</sup> prout per Rule; for so is implied in the Notes.

Notes. See Keeble 1 part 504, 907.

See a Verdict amended by the Notes, after Judgment and Error brought. Rolls 1 part, Report 82.

If the matter and substance of the Issue be found, it is sufficient, for precise forms are not required by Law in special Verdicts, (which are the finding of Lay Men) as in Pleadings which are made by Men Learned in the Law, and therefore intendment in many cases shall help a special Verdict, as much as a Testament, Arbitrement, &c. And

Form. Hob. 54.

And therefore he which makes a Deputy, ought to do it by Escript; but when the Jury find generally, that A. was Deputy to B. all necessary incidents are found by this; and upon the matter they find, that he was made Deputy by Wæd, because it doth tantamount. Lib. 9. 51. And in the 5th Report, Goodal's Case, It was resolved, That all matters in a special Verdict, shall be intended, and supplied, but only that which the Jury refer to the consideration of the Court.

Ill conclusion.

More 105,  
269.  
Littletons  
Rep. 135, 94,  
106.

In all Cases where the Jury find the matter committed to their charge at large, and over more conclude against Law, the Verdict is good and the conclusion ill. Lib. 4. 42. And the Judges of the Law will give Judgment upon the special matter according to the Law, without having regard to the conclusion of the Jury, who ought not to take upon them Judgment of the Law. Lib. 11. 10. Vide hic. 400.

As general as  
the Nar.

Where the Declaration in Trespas is, Cum aliquibus averiis, of a number uncertain, and the Verdict is as general as the Declaration, Cum aliquibus averiis, there the Verdict is good. Cro. 2 part, 662.

In Ejectione firmæ, where the Plaintiff declared of a Messuage and three hundred Acres of Pasture in D. per nomina, of the Manors of Monkhal, and five Cloles per nomina, &c. Upon Not Guilty, the Jury gave a special Verdict, viz. quoad four Cloles of Pasture, containing by estimation two thousand Acres of Pasture, that the Defendant was Not Guilty, Quoad residuum; they

they found matter in Law: And it was moved by Yelverton, That this Verdict was imperfect, in all: For when the Jury find that the Defendant was Not Guilty of four closes of Pasture, containing by estimation two thousand Acres of Pasture, it is uncertain, and doth not appear of how much they acquit him. And then, when they find Quoad residuum, the special matter, it is uncertain what the residue is, so there cannot be any Judgment given; and that Opinion was all the Court, whereupon they awarded a Venire facias de novo, to try that Issue. Cro. 2 part, 113.

Ejectione firmæ of thirty Acres of Land D. and S. The Defendant was found guilty of ten Acres, and Quoad residuum Not Guilty; and it was moved in arrest of Judgment, That it is uncertain in which of the Wills this Land lay; and therefore no Judgment can be given: sed non allocatur, and it was adjudged for the Plaintiff, so the Sheriff shall take his information from the party for what ten Acres the Verdict was. Cro. last part, 465. Diversitas apparet.

Where the Jury find Circumstances upon Circumstances Evidence given, to incite them to find

fraud, &c. yet the same is not sufficient matter upon which the Court can judge the same to be fraud, &c. Brownlow 2 part, 187.

Yet in many Cases the Jury may find circumstances and presumptions, upon which the Court ought to judge. As to find that

the Husband delivered Goods devised by the Wife. Upon this, the Court adjudged  
More 192.  
Carters Rep.  
16.

ed that the Husband assented to the verdict at first.

*Postea amend-  
ed, how.*

Where a Verdict is certainly given at the Tryal, and uncertainly returned by the Clerk of the Assises, &c. The Postea may be amended, upon the Judges certifying the truth how the Verdict was given. Cro. 1 part, 338. See Keeble 2 part, 875. Where the Court would not compel the bringing in the Postea, 1 part, 346.

*Ill Plea, made  
good by Ver-  
dict.  
Keebles 2 part  
362.*

In many Cases a Verdict may make an ill Plea or Issue good. As in an Action for Words, Thou wast Perjured, and hast made to Answer for it before God. Exception after Verdict for the Plaintiff, in arrest of Judgment: For that it is not laid in the Declaration, that he spake the Words *auditu quamplurimorum*, or of any one, according to the usual form: sed non allocatur; for being found by the Verdict that he spake them, it is not material, although he doth not say, in *auditu plurimorum*; whereupon it was adjudged for the Plaintiff. Cro. 1 part, 199. So want of a day in the Bar made good by Verdict. Keeble 3 part, 354.

See Cro. last part, 116. Where the Bar was ill, because no place of payment was alledged, yet the payment being found by Verdict, it was adjudged well enough; for a payment in one place, is a payment in all places. Keeble 1 part, 662, 771, 786, 793. Siderfin 306, 290, 341, 342, 379. Littletons Rep. 184, 200, &c. Modern Rep. 42, 43. Hardres Rep. 42, 43.

In an Action of the Case, for continuance of a Wall, by which the Plaintiffs Lights were stopped, in an ancient House. Per Cur. The Plaintiff ought to shew the Wall was new, and is not helped by Verdict. Keeble 1 part, 584.

Not Guilty is a good Plea after Verdict in assumpsit, so on non assumpsit the Jury may find the Defendant Guilty. Keeble 1 part, 795.

In an Action sur assumpsit, laid twenty years since, & non cul. infra sex annos, & replic. infra sex annos, which is a departure, yet the Verdict helps it. Keeble 1 part, 566.

In pleading riens avoit Jour del brief, and laid not ne unque puis, and the Jury find it, it is helped by the Verdict.

But Drake said, the same after Verdict was helped by the Statute of Jeofails.

The like 22 E. 4. 46. Que le Baron ne soit seisie que Dower Jour del Espousal, &c.

So if an Executor plead Riens enter mains Jour del breif, &c. and omit ne unque puis.

6 H. 7. 14.

Debt versus  
Heir.

Debt brought upon a Bond against an Heir in the Detinet only, and upon riens per discent there was a Verdict for the Plaintiff, 'tis naught upon a Demurrur, but after Verdict is aided by the Statute 16 and 17 Car. 2. cap. 8. Which is (after several matters of substance) thereby Enacted to be amended after Verdict, and other matters of like nature, not being against the right of the matter in Suit, &c. shall not stay Judgment, Syderfin 342. Keebles 2 part, 259, 278, 309, 407. 1 part, 662, 771.

¶

An

Way.

A replender  
was denied.  
Keeble 1 part,  
498, 829.

Baron and  
Feme.  
*Vide* Keeble 1  
part, 944.  
Court against  
Baron and  
Feme, of Tres-  
pals done, *cum*  
*averijs suis*,  
after Verdict  
allowed good.  
946.

An Indictment of Extortion against a  
Wayliff, quod colore officij extorsive & injurio-  
se he took Mony, and sheweth not the par-  
ticulars; good per curiam, especially after  
Verdict. Keeble 1 part, 357.

In Information for not repairing a High  
Way in their Parish. Upon Non debent  
reparare, the Verdict found so, for the De-  
fendant. The Court held the Issue ill, be-  
cause 'tis contrary to Law, the Way being  
in their own Parish, they ought to have  
shewed who ought to repair, and if the Ver-  
dict had found that the Defendant ought to  
repair, it had been well enough, however  
after Verdict the Court gave Judgment,  
that the Defendant should be acquitted.

Trespals by Baron and Feme, de clauso  
fracto, of the Barons, and for the battery  
of the Feme, ad dampnum ipsorum. The De-  
fendant, Quoad the clausum fregit, pleaded  
Not Guilty, Quoad the Battery justifies. And  
for the first Issue, it was found for the De-  
fendant; and for the second, for the Plain-  
tiff, and now moved in Arrest of Judgment,  
that the Declaration is not good, because the  
Baron joyns the Feme with him in Trespals  
de clauso fracto of the Barons, which ought  
not to be; but for the Battery of the Feme,  
they may joyn, whereto all the Court agreed;  
but it was moved, That in regard it was  
found against the Plaintiffs for this Issue,  
in which they ought not to joyn, and the  
Defendant is thereof acquitted, and the Is-  
sue is found against the Defendant, for  
that part wherein they ought to joyn: This  
Verdict has discharged the Declaration for  
that

that part which is ill, and is good for the residue. As in 9 E. 4. 51. Trespas by Baron and Feme; for the Battery of both: The Defendant pleaded Not Guilty, and found Guilty, and Damages assessed for the battery of the Baron, by it self, and for the battery of the Feme, by it self, and Judgment was given for the Damages for the battery of the Feme, and the Writ abated for the residue. (And of that Opinion was Lea, Chief Justice, and Dodridge al contra.) And the same Law I conceive, if the Jury had found the Defendant Not Guilty of the battery to the Husband, but Guilty to the Wife. Cro. 2 part, 655. Palmer's Rep. 338.

Rochel and his Wife brought an Action of Trespass and Assault in the Exchequer, Hill. 1659. against Steel and others, who pleaded Not Guilty, and the Verdict found Steel guilty of battery to the Wife, but found nothing concerning the Husband; wherefore Judgment was stayed; but the Barons held, That if the Jury had found the Defendants Not Guilty, as to the Husband, then the Verdict had helped the Declaration, and the Plaintiff should have had Judgment for the damages for the battery of the Wife. Rochel and his Wife against Steel.

Horton and his Wife declared in Trespass for beating the Wife, ad dampnum ipsorum, and good. Syderfin 387.

The Jury may find any thing that may be given in Evidence to them, as Records, either Patent, Statute, or Judgment. Things done in another County or County; for which see Evidence before. Hob. 227. And of those things they ought to have Of what a Verdict may be. Plo. Com. 411.

Incidents.

have Conusance; they are to have Conusance also, of all incidents and dependants thereupon; for an Incident is a thing necessarily depending upon another. Co. Lit. 227 b.

How construed.

If the Verdict may any ways be construed good, a construction to destroy it ought not to be made. Carters Rep. 80, 94.

Outlaw.

If one of the Jury be Outlawed when the Verdict is found, the Verdict is not good, but may be reversed by Error.

In a special Verdict, the Case in Fact must be found clear to a Common intent, without Equivocation. Vaughans Rep. 78.

Contents of a Deed.

If the Jury collect the Contents of a Deed, and also find the Deed in hæc verba, the Court is not to judge upon their Collection, but upon the Deed it self. The Jury may find the Contents of a Deed or Will proved by Witnesses. Ib.

Common.

Trespas for disturbing him of his Common belonging to an hundred Acres, and the Jury find Common for fifty, this is for the Plaintiff; otherwise upon an Avowry, or Quod permittat, which are founded upon the right, but the Trespas is for Damages. Palmers Rep. 289.

*Vide apres 403.*

The Verdict may be against the Letter of the Issue, so the substance is found.

If the matter and substance of the Issue be found, it is sufficient, though it be against the Letter of the Issue. As in the first, Institutes, f. 114. b. A Modus decimandi was allowed by prescription time out of mind, for Tythes of Lambs, and thereupon Issue joyned. And the Jury found, that before twenty years then last past, there was such a Prescription, and that for these twenty years, he had paid Tythe Lamb in specie.

Prescription.

specie. And it was objected first, That the Issue was found against the Plaintiff, for that the Prescription was general for all the time of the Prescription, and twenty years fail thereof. Secondly, That the party by payment of Tythes in specie, had waived the Prescription or Custom. But it was adjudged for the Plaintiff, for albeit the Modus decimandi had not been paid by the space of twenty years, yet the Prescription being found, the substance of the Issue is found for the Plaintiff.

In an Assise of Darrein presentment, if the Plaintiff alledge the avoydance of the Church by privation, and the Jury find the voydance by death, the Plaintiff shall have Judgment; for the manner of voydance is not the title of the Plaintiff, but the voydance is the matter. 1. Inst. 282.

If a Gardian of an Hospitall bring an Assise against the Ordinary, he pleadeth that in his Visitation he deprived him as Ordinary, whereupon Issue is taken, and it is found that he deprived him as Patron, the Ordinary shall have Judgment, for the deprivation is the substance of the matter. lb.

The Lessee Covenants with the Lessor not to cut down any Trees, &c. and binds himself in a Bond of forty pounds for the performance of Covenants. The Lessee cut down ten Trees, the Lessor bringeth an Action of Debt upon the Bond, and assigneth a breach, That the Lessee cut down twenty Trees, whereupon Issue is joyned, and the Jury find that the Lessee cut down ten: Judgment shall be given for the Plaintiff,

Deprivation.

Breach of 20  
Trees cut  
down for 10.

for sufficient matter of Issue is found for the Plaintiff to forfeit the Bond. Ib.

And this Rule holds in Criminal Causes: For if A. be appealed, or indicted of Murder, viz. that he of malice premeditated killed J. A pleaveth that he is Not Guilty, *Modo*

Indictment of Murder, and Verdict finds Manslaughter. Siderfin 325.

& *forma*, yet the Jury may find the Defendant Guilty of Manslaughter without malice premeditated, because the killing of J. is the matter, and malice premeditated is but a Circumstance. *Plo. Com.* 101.

*Modo & forma.*

And generally where *modo & forma*, are not of the substance of the Issue, but words of Form, these it sufficeth, though the Verdict doth not find the precise Issue.

Alienation.

As if a Man bring a Writ of Entry in *casu proviso*, of the Alienation made by the Tenant in Dower to his disinherittance, and counteth of the Alienation made in fee, and the Tenant saith, That he did not Aliene in manner as the Demandant hath declared, and upon this they are at Issue, and it is found by Verdict, that the Tenant alieneed in Tail, or for term of another Mans life. The Demandant shall recover, yet the Alienation was not in manner as the Demandant hath declared. *Littleton*, Sect. 483.

Trespals by the Tenant against the Lord.

Also if there be Lord and Tenant, and the Tenant hold of the Lord by Fealty only, and the Lord distrain the Tenant for Rent, and the Tenant bringeth a Writ of Trespals against his Lord, for his Cattel so taken, and the Lord plead that the Tenant holds of him by Fealty and certain Rent, and for that Rent behind he came to

dis

distrain, &c. And demand Judgment of the Writ brought against him, Quare vi & armis, &c. And the other saith that he doth not hold of him in manner as he supposed; and upon this they are at Issue. And it is found by Verdict, that he holdeth of him by Fealty only, in this case the Writ shall abate, and yet he doth not hold of him, in manner as the Lord hath said; for the matter of the Issue is, Whether the Tenant holdeth of him or no; for if he holdeth of him, although that the Lord distrain the Tenant for other services which he ought not to have, yet such Writ of Trespass, Quare vi & armis, &c. doth not lye against the Lord, but shall abate. Littleton, Sect. 485.

Also in a Writ of Trespass for Battery, The Verdict or for Goods carryed away, if the Defendant plead not Guilty in manner as the Plaintiff suppoeth, and it is found that the Defendant is Guilty in another Town, or at another day, than the Plaintiff suppose, yet he shall recover.

So the Jury may find the Conspiracy at another day, for the day is but form.

In Battery, if the Defendant justifie at Battery, another day with a Traverse, Devant & apres, he may be found Guilty at another day.

If the Defendant by his Plea agree with the Plaintiff in the day, year and place, and the Plaintiff reply, De son tort demesn sans tiel cause, and the Defendant prove an Assault by the Plaintiff, the Plaintiff shall not give in Evidence a Battery at another day. Rolls. tit. Tryal 687. Vide devant cap. 11.

And so in many other Cases these words, scil. in manner as the Demandant or the Plaintiff hath supposed, do not make any matter of substance of the Issue. Littleton Sect. 485.

*Modo & forma*,  
when words  
of form.  
Siderfin 357.

And 'tis a Rule, That where the Issue taken goeth to the point of the Writ or Action, there *Modo & forma* are but words of form, as in the cases aforesaid.

When of substance, and must be found by the Verdict.

But when a Collateral point in pleading is traversed, as if a Feoffment be alleged by two, and this is traversed *Modo & forma*; and it is found the Feoffment of one, there *Modo & forma* is material: so if a Feoffment be pleaded by Deed, and it is traversed Absque hoc quod feoffavit *Modo & forma*, upon this Collateral Issue, *Modo & forma* are so essential, as the Jury cannot find a Feoffment without Deed. Co. Littleton, 282.

So in non assumpsit *modo & forma*, upon an indebitatus assumpsit, there *modo & forma*, were not material. Secus, when the Action is upon a Collateral promise.

Trespas Quare vi & armis, lies not against the Lord for distraining his Tenant, without cause.

But here is a diversity to be observed, That albeit the Issue be upon a Collateral point, yet if by the finding of part of the Issue, it shall appear to the Court, that no such Action lyeth for the Plaintiff, no more than if the whole had been found, there *Modo & forma*, are but words of form, as in the aforesaid Case of the Lord and Tenant, it plainly appears; for it was all one, whether the Tenant held by Fealty only, or by Fealty and Rent, because if either was true, the Tenant could have no Trespas, Quare vi & armis, against the Lord in that Case,

Case, by the Statute of Marlbridge. Cap. 3.  
Vide hic Devant.

After the Verdict recorded, the Jury cannot vary from it, but before it is recorded they may vary from the first offer of their Verdict. And that Verdict which is recorded shall stand. 1 Inst. 227. Plow. Com. 212.

Jury cannot vary from their Verdict when it is recorded.

There is also a Verdict given in open Court, and a privy Verdict given out of Court, before any of the Judges of the Court, so called, because it ought to be kept secret and privy from each of the parties, before it be affirmed in Court.

Open Verdict and privy Verdict.

Because the Jury may vary from their private Verdict, as if that find for the Plaintiff, the open Verdict may be for the Defendant, and this shall stand, and the private Verdict shall not be deemed a Verdict; for the Jury are charged openly in Court, and in Court their Verdict ought to be received, and this which they pronounce openly in Court, shall be adjudged their Verdict.

The Jury may vary from a private Verdict.

And although it is usual to take the Verdict secretly, when the Jurors are agreed, yet this is not of necessity of Law, but of courtesie of Law for the ease of the Jurors, and in this case, their saying shall not be their Verdict till it is openly pronounced in the Court; for when they come in the Court, the Plaintiff shall be demanded, and then may be non-sued: but when they give their Verdict secretly, the Plaintiff is not demandable, nor can be then non-sued, but he may be non-sued, when the Verdict of right ought to be rendered. Ergo, the force is in the giving of the Verdict in the Court, and not elsewhere.

And

Bro. tit. Ver-  
dict. 12.

And also in the Court it self, if they pronounce their Verdict, they may change it, if they be mistaken, or if it be not full in Law, or for some other reasonable cause immediately perceived. Therefore if they may vary, and contradict their first Verdict given in open Court, a fortiori upon better advisement, they may do so when their first Verdict was given out of Court, and they not discharged; for they be in the custody of the Bailly, till they be discharged in Court. Flo. Com. 211. More 33.

Jury shall give  
but one Ver-  
dict in the  
same Cause.

The Jury having once given their Verdict, although it be imperfect, shall never be sworn again upon the same Issue (unless it be in case of Assise, when the party is to recover by view of the Jurors.) But there must be a Venire facias de novo. Cro. 2 part, 210.

Verdict good  
in part.

If a Verdict be good in part, and naught in another part, it shall stand in part, and a new Inquest shall be for the rest. Bro. tit. Verdict. 89.

What permitted  
in Pleading  
for the  
Juries direction  
in their  
Verdict.

For the Juries direction in their Verdict, greater liberty is permitted in pleading a matter doubtful in Law; for, a Traverse (for this reason) may be omitted. As in Debt against an Executor, it is a good Plea to say, Administration was committed to him, and therefore he should be named Administrator, and not Executor, without traversing that he is not Executor; for the Lay People know no difference, between one administering as Executor, and one administering as Administrator. 9 E. 4. 33.

For this Reason likewise, the special matter may be pleaded together with the general Issue, &c. As that the Obligation put in suit was sealed by him, and delivered to A. to keep till certain Indentures were made between the Plaintiff and him, before which Indentures made, the Plaintiff took the Obligation out of the possession of A. so is not his Deed. This is good, and yet by this general conclusion, the matter precedent shall not be waved, for it were perilous to put the special matter in the mouth of Lay-people. 9 H. 6. 38.

A special non est actum.

Damages in Trespals, if a Release be pleaded in a Foreign County, and tryed there for the Plaintiff, there also shall Damages be assessed by the same Jury. For where the principal is tryed, there also shall the Accessary and Incidents be enquired of. I need use no other Instances to illustrate this, than the Case abovesaid.

Where the Issue upon a collateral Matter is tryed in a foreign County, Hundred, &c. where the Principal and Accessary shall be tryed.

They may find a Condition to defeat a Freehold of Land, although it be not pleaded; but of things in Grant, they must also find the Deed of the Condition.

21 Ass. 14. What things the Jury may find.

Upon Traverse of a Lease Modo & forma, the Jury may find a Lease of another date, although the date be mistaken in the Pleading, but not a Lease made by another, than from whom was pleaded; for this is out of the Issue in matter and form.

Modo & forma.

In an Assise of Rent, the Jury may find that the Rent was granted with an Attornment, although no specialty be shewed.

Rent.

Matter of Record.

A Fine or Recovery may be found by the Jury, without shewing of it under Seal. The Jury cannot find against what is admitted by the Record. Siderfin 271.

Record.

If the Verdict be contrary to a matter of Record, it may be set aside as naught.

Inspection.

If a party be found by inspection to be within Age, the Verdict that finds him of Age shall be holden for none.

Jeofail.

A Verdict finding matter against the Record is a Jeofail. 11 H. 6. 42.

Divorce.

They may find a Divorce, which is a Record in the Spiritual Court, but not by our Law.

Attalader.

The Verdict found an Attainder of Felony not pleaded, nor given in Evidence Sub pede Sigilli. 26 Ass. 2. And the Court took it ill.

So of a Fine and Recovery where found not pleaded, nor given in Evidence sub pede sigilli. 26 Assise 5.

The Jury is not to inquire of this which is agreed by the parties.

Dower.

As in Dower, if the Tenant says he has been always ready to render Dower, and the Issue be if the Husband dyed seised, the Jury is not to enquire if the Estate was dowerable, for this is confessed.

Wast.

If the Defendant doth not deny the Wast, but pleads another matter, scilicet nul tiel villou, &c. The Jury is not to inquire of the Wast, but give Damages although no Wast be made.

Award.

In Debt upon a Bond, with a Condition to perform an Award, and the Defendant plead Nullum fecit Arbitrium, and the Plaintiff

iff reply, fecit Arbitrium, and sets it forth, and the Defendant rejoyn Nul tiel award, the Jury cannot find any matter dehors to make the Award void in Law, which doth not appear within the Award pleaded; As that the Release awarded would discharge the Bond of the Submission, for nothing is in Issue, but whether such an Award was made in fait, as is alledged, neither could this matter be alledged by any Resoynder; for it would have been a departure from the Plea, and a Jury cannot find that which would have been a departure, because out of their Issue. But in this Case, if the Defendant would have took advantage of it, he ought to have pleaded all this matter in his Barr, and not have said Nullum fecit Arbitrium; for 'tis a departure in the Resoynder to acknowledge an Award which was denied in the Plea.

In Debt for twenty shillings, and the Issue be, solvit ad diem, and the Verdict be Quod debet the twenty shillings, this is not good, because it is not direct but by Argument.

How the Jury ought to find their Verdict, and what shall be intended.

In Debt upon an Obligation, if the Defendant say, That he is a Layman, not lettered, and 'twas read as an Acquittance, Et issint nient son fait, if the Jury find he knew what he did, and that it was a Bond, and he was willing to be bound, this is no good Verdict, because they ought precisely to find if it was his Deed or not.

Nient Lettered.

Custom.

If the Issue be, whether where a Coppehold is granted to three for the Liberties of two, if he which dye seised, &c. ought by Custom to pay an Heriot or not, and the Jury find that there was never any such Estate granted in the Manor, this is not good for the reasons aforesaid.

So if the Issue be, if by custom an Estreptail may be granted, and the Jury find that it may be granted in Fee; which is greater, yet 'tis not good.

Trespas.

In Trespas for taking and cutting his Leather, if the Defendant justifie as a Searcher, and cut it for the better search More Scrutatorum, without any other damage; and the Plaintiff reply, De injuria sua propria absq; hoc, that he cut it More Scrutatorum, upon which Traverse Issue is joyned, and the Jury find that the Defendant cut it as the Plaintiff has alleged; this is no good Verdict, because 'tis not any Answer to the Issue but by Argument.

Battery.

In Trespas and Battery in A. to find Not Guilty in A. is not good; for it ought to be generally Not Guilty.

Riens per Descent.

Upon this Plea, if the Plaintiff reply That he hath divers Lands in D. per descent, and the Jury find he hath divers Lands by descent, this is good, without finding what; for 'tis not material, in regard upon this false Plea a general Judgment, is to be without having respect to the Assets.

Uncertain.

Of five Acres, if they find the Defens. Ejectment.  
 nt guilty in eight pieces, de terre par-  
 tenementorum prædict, 'tis a void Verdict  
 cause uncertain, and no Execution can be  
 made of pieces,

In Ejectment of a Manor, on non culp. Manor.  
 The Verdict was for the Plaintiff for the  
 Manor, and Quoad servitia non culp. 'Twas  
 objected that the Verdict was not for the  
 Plaintiff for the Manor, because as to the  
 services 'twas for the Defendant; but 'twas  
 answered the last part: as to the services was  
 void and surplusage. Siderfin 232. Keeble  
 part, 810.

In Case upon non Assumpsit pleaded, if Verdict speci-  
 al.  
 The Jury find that the Defendant non As-  
 sumpsit; yet if two Witnesses say true, then  
 they find that he did Assume. The first shall  
 stand for the Defendant, and the last words  
 be void; and surplusage shall not vitiate. Surplusage.

Al upon a Lease of twenty Acres and Ejectment.  
 The Jury find Quod dimisit ten Acres tantum,  
 and the conclusion of the Verdict is, Et si,  
 super totam materiam Curia videbitur quod  
 Defendant dimisit twenty Acres, then they  
 find for the Plaintiff; and if not, then for  
 the Defendant, this is repugnant, and so  
 the Verdict is void in all.

In ejectione firmæ de 7 Messuagijs five Te-  
 nementis, and Verdict pro querente. 'Tis  
 ill for the incertainty, and the Verdict doth  
 not help it; and Hale refused to let the  
 Jury find for the Plaintiff, for the Messua-  
 ges, and non cul. for the Tenements; but  
 by Twisden, if it had been de uno Messuag.  
 five tenemento vocato, the Black Swan, it had  
 been

bán good, because the last part makes it certain. Syderfin 295. Keeble 2 part, 80. Cro. 3 part, 186.

Certain.

To Assess Damages incertainly is void, as to say we Assess forty pound, if we must by Law, if not then but thæ pound, this is void.

Damages.

Indebitatus assumpsit, to Assess Damages occasione debiti prædicti is good, although it ought to be occasione non performance, &c.

Information.

In an Information upon the Statute 39 El. Cap. 11. for Dying with Roguery, by which he lost twenty pounds for every Offence; upon Not Guilty, if the Jury find him Guilty for using this against the Statute for forty days, by which he lost this is not good, because he forfeits twenty pounds for every time, and the number of times do not appear.

If the Jury find the words in the Will, and yet do not find the Will, the Verdict is not good.

If they first find the special matter, and then find the Issue generally, the special matter is hereby waived.

Where a Special Verdict shall be good by Intendment.

If the Jury find that J. S. was seized in Fee, and Devised the Land to J. D. although they do not find that the Land was held in Socage, yet this is good; for this shall be intended, this being a Collateral thing, and this being the most common Tenure.

Devastavit.

Verdict of Clogment and Conversion to his own use, proves a Devastavit, Keeble 2 part, 488.

If they find that he was seised and Will.  
made his Will in hæc verba, &c. although  
they do not find that he Devised the Land  
in the former; yet this is good by intend-  
ment.

But if a thing is left out, and cannot be  
intended, the Verdict is not good.

If the Issue be whether the Sheriff took  
J. S. and kept him in Prison in Execution  
of certain Debt and Damages by force of a  
Capias ad satisfaciendum, and the Jury find  
that he took him by force of an Alias Capias  
ad satisfaciendum, &c. although they do not  
find that he kept him in Execution for  
the Debt and Damages aforesaid, accord-  
ing to the Issue, yet this is a good Spe-  
cial Verdict; for it shall be intended; for  
the Consequence is necessary from this  
which is found, for he could not take him,  
but that he must be in Execution. Vide se-  
veral instances of this. Rolls tit. Tryal, 697.  
&c.

If the Jury find that J. S. was seised in  
fee, and made his Will in hæc verba, and  
that he afterwards dyed; although they do  
not find that he dyed seised, yet it shall be  
intended that he dyed seised, and so good. Will.

If they find that A. did Bargain and  
sell, &c. although they do not find any con-  
sideration, yet this shall be intended. Bargain and  
Sale.

So if they find that such Persons Autho-  
rized by Letters Patent of the Queen's Ma-  
jesty Elizabethæ, &c. and do not find that the  
Letters Patents were under the Great Seal,  
yet this shall be intended. Letters Pa-  
tents.

Intent.

Verdicts of Lay-Men shall be taken according to their intent, and need not so precise a form as in Pleadings. Lib. 4. 65. Hob. 76. Siderfin 27, 75. Littleton Reports 133. &c.

Wherefore if the Jury find a Recognizance in nature of a Statute Staple in this manner, That the Conusor came before R. O. Recorder of London, and T. O. Mayor of the Staple, Et recognovit se debere to B. 200l. and do not say, Secundum formam Statuti, &c. nor Prescriptum Obligatorium, &c. although the Statute of 23 H. 8. provide, That it shall be by Will Obligatory, sealed with three Seals; and here it doth not appear, that there was any Bond or Seal, nor that it was according to the Statute; yet these things shall be intended, they having found a Recognizance before the Mayor and Recorder.

Notes.

A special Verdict may be amended by the Notes. Keeble 1 part, 907. See a Coroners Inquisition amended by his Notes.

Where a special Conclusion of a special Verdict shall add the Imperfections of it.

If the Jury find a special Verdict, and refer the Law upon that special Matter to the Court, although they do not find any right for the Defendant, which is a Collateral thing to the point which they refer to the Court, yet the Verdict is good enough, for all other things shall be intended, except this which is referred to the Court. Lib. 5. 97. Littletons Rep. 135. &c. Keebles 1 part, 362, 412.

In Escheatment, If the Plaintiff declares upon a Lease made by A. and the Jury find a special Verdict, and matter in Law upon

a power of Revocation of Uses by an Indenture and Limitation of new Uses, and then a Lease for Years made to the Plaintiff by the Lessor in the Declaration, and another, in which there is an apparent variance; but they conclude the Verdict, and refer to the Court, whether the Grant of a new Estate found in the Verdict, be a revocation of the first Indenture, or not. The special conclusion shall aid the Verdict, so that the Court cannot take notice of the variance between the Lease in the Declaration and Verdict, because the doubt touching the Revocation, is only referred to the Court. And although they refer to the Court, whether this be a Revocation of the first Indenture, and not of the former Uses, and Limitation of new Uses, as it ought to be; yet in a Verdict this is good, for their intention appears.

So note a difference between a special Conclusion and Reference to the Court, and a general Conclusion, and Reference to the Court. Vide hic 379.

In Debt for forty shillings for a Horse sold, and the Jury find forty shillings Debt, for two Horses sold; this is found against the Plaintiff, for this is not the same Contract. For whom the Verdict shall be said to be found.

So in Debt for twenty pound, if the Jury find forty pound Debt, this is against the Plaintiff.

In Debt for twenty pound for Wood sold, and the Jury find the Bargain was for twenty marks; the Plaintiff shall not have Judgment for this variance.

So in Debt for Kent upon a Demise of two Acres, and the Jury find it upon the Demise of one Acre, the Plaintiff shall not have Judgment.

But in Debt for twenty four pounds eight shillings, received for the Plaintiffs use, if the Jury find the Defendant owes twenty four pounds, but not the eight shillings, the Plaintiff shall have Judgment; for perhaps he had paid the eight shilling.

In an Action upon the Case against A. if the Plaintiff declares, That by Custom, &c. amongst Merchants, &c. If two are found in Arrearages upon Accompt, and they assume to pay this at certain days, that any one of them may be charged for the whole by himself, and then shews the Accompt of A. and B. who are found in Arrear, in so much, &c. And promised to pay this at certain days, but paid it not, and now he brings his Action against A. although upon Non Assumpsit pleaded, it be found that the days of payment are mistaken, yet the days being past the Action lyes, because the Law makes the duty upon the Accompt; for which after the days an Action lyes.

In Debt upon a Lease of twenty Acres, The Defendant pleaded the Lease was of twenty four Acres, sans ceo que il demise les 20 Acres tantum. The Verdict found the Demise of twenty one Acres only; 'twas looked upon as a Jeofail, and found for neither Plaintiff nor Defendant. Dyer 32.

If the Issue be Assets in Sale, and the Verdict be Assets in Dale, 'tis a good Verdict.

dict, for the place is not material. Keeble 1 part, 662.

So of an Accompt before A. and B. An Accompt found before A. tantum is good.

In Escape of Baron and Feme, and the Jury find of the Baron only, 'tis good, and so in other Actions grounded upon a Tort to find part. But upon a Contract the Verdict ought to pursue the Declaration, otherwise in Debt upon a Lease for years, or Rent. Siderfin 5, 6. Keeble 1 part, 371.

Issue whether Money was paid for Blackacre. Verdict, that it was paid for Blackacre and Whiteacre, good: so per Twisden, whether a Common was from Lady-day to Michaelmas, and the Verdict finds from Christmas to Michaelmas day, 'tis good. Keeb. 1 p. 192.

Indictment of forcible Entry and Detainer, A Verdict of forcible Entry and forcible Detainer is sufficient to grant Restitution upon. Keeble 1 part, 419.

Barwel prayed Bill of forcible Entry and Detainer, found Ignoramus as to the Detainer, and Billa Vera as to the Entry, might be quash'd, which was done, for the Defence as charged being intire, the Grand Jury cannot appoition their Verdict as the Petit Jury on Indictment may. Keeble 1 part 931.

Where all is to be given in Damages, Damages. The Jury are Chancellors, and may give so much as the Case requires in Equity.

In Detinue of a Bond of 100 l. if the Defendant find that he received a Bond of a greater or less Sum, the Verdict is for the Defendant.

Promise.

So in a promise to do two things, if the Jury find but one of them, 'tis for the Defendant.

Ejectment.

Otherwise in Ejectment upon a Promise of ten Acres, if the Jury find a Promise of less, the Plaintiff shall have Judgment.

Prescription.

*Vide Devant.*

385.

If the Issue be upon a Prescription for Common belonging to a Messuage and two hundred Acres of Land, fifty of Meadow and fifty of Pasture; if the Jury find Common belonging to the House, twenty Acres of Meadow, and twenty of Pasture in two of the Wills, and not in the rest, the Prescription is not found.

Trespas.

If part of the Trespas or wrong be found 'tis sufficient in Trespas or an Action of the Case upon a Tort; as by a Commoner, for putting and depasturing Cattle in the Common.

Case.

*Audita Querela.*

If the Issue be whether all the Land is in Execution, were the Estate of the Feoffee in Tail, or in Fee, and part is found in Tail, and part in Fee; Judgment shall be given for the Defendant who pleads the seisin in Fee.

Ejectment.

If the Plaintiff declares upon a Demise made the first of May, to commence at Michaelmas next, if the Jury find a Lease made at any other day before the Feast, it is found for the Plaintiff; for the day of making is not material.

Otherwise of a Lease for years in Possession; as of a Lease made the fifth of November Habend. for three years from Lady-day before; and the Jury find a Lease made the

5th day of May, for three years, from the same Lady-day; for this is a lease in Possession.

In false Imprisonment in Middlesex, and Imprisonment. The Defendant justifies in London, to which

The Plaintiff saith, The Defendant took him in Middlesex, de son Tort demesin, and Issue upon this, and the Jury find the Defendant took him in Middlesex lawfully upon a Writ, yet this is for the Plaintiff; for the Issue is upon the place, and not upon the Tort, for that is confessed by the Pleading, if the taking was in Middlesex.

In Debt for twenty pound, and the Jury Debt. find forty pound, the Plaintiff shall not have Judgment, the reason seems to be because it cannot be the same Debt which is intire; but upon another Contract, which is mislaid.

If the Issue be payment after Execution, Audita Qua- and the Jury find payment before, yet the rela. Issue is proved; for payment before is paid. Vide 198. ment after.

In Debt upon a Bond, bearing date the 5th of June, upon Non est factum, if the Jury find it his Deed, but that it was delivered eight days after the date, this is found for the Plaintiff. Obligation.

If the Issue be that two made the Feoffment, or two were Church-wardens, &c. Joynr and several. and the Jury find but one, &c. the Issue is not found.

If the breach of Covenant or Waste be assigned in cutting twenty Trees, and the Obligation: Covenant. Waste. Jury find but ten, yet the Plaintiff shall have Judgment.

**Totum & Pars.**

If in Replevin, &c. the Jury find the part of the Cattel were Levant and Couchant, and part not, and the Issue is upon all, the Issue is not found.

In Debt, tam quam, on the Statute Jac. cap. 22. for cutting Oaks unseasonably, on not Guilty, and Verdict for the Plaintiff, 'twas excepted in Arrest of Judgment, That the Jury found the value of each Tree six shillings eight pence, but do not cast up the sum. Sed per curiam in this Issue 'tis needless; but had the Issue been nil debet, they must cast it up, and not leave it to the Court, Keeble 1 part, 835.

**Indictment.**

Keeling excepted to an Indictment of Assault, Battery and Wounding. The Jury find him Not Guilty de transgress. & insult. pred. Sed per cur. 'tis well enough, and comprehends the whole, contra if it had been de insult. pred. only, and the Presentment, Traverse and Tryal was all at the same day and Sessions, ex assensu, being a favour to the Party. Keeble 1 part, 879.

**Ejectment.  
Void in part.**

In Ejectment for him who pleaded all, & fourteen Acres, and the Jury find Guilty of twenty, the Plaintiff shall have Judgment for the fourteen, and the Verdict is void for the residue.

**Information.  
Usury.**

In an Information upon an usurious Contract by two, 'tis not sufficient to find a Contract by one. Otherwise where the Tort and offence is several, as against two upon the Statute 4 E. 6. Pro emptione butiri, and selling it by Retail, &c. and so in an Action upon the Case in Nature of Conspiracy, and for words laid twice in one Declaration.

This

This will put in Issue the manner as well *Modo & forma*. as the matter, where the manner is material; as the time of the Fact and other Circumstances.

The Plaintiff replies that W. made a Replevin. Lease to him 30 Martij Habend. from Lady. Lease. May last, and Issue *Modo & forma*, and the Jury find a Lease made the 25 Martij Habendum extunc for a Year, this is good, Although the time of making and commencement of the Lease are mistaken, inasmuch as extunc includes the Feast. Yet because a sufficient Title and Lease is found for the Plaintiff to put in his Cattel, this is sufficient, this being the substance, and the *Modo & forma* shall not put the circumstances in Issue.

So in Trespasse, if the Defendant justifie the putting in his Cattel for Common, which he claims from Pentecost to a certain time every Year, which is traversed *Modo & forma*, and the Jury find that he had Common in Vigilia Pentecostis in festo, and the day next to this to the time, this is found for the Defendant.

But otherwise in these Cases in an Assise of Common, because there he ought to recover his Title.

In Debt for Rent, if the Defendant plead an Entry by the Plaintiff, before the Rent was due, scilicet such a day which was after, and Issue upon the Entry *Modo & forma*, and the Jury find for the Defendant, he shall have Judgment, for the scilicet is void, and the *Modo & forma* go to the matter. See after.

In

*Non est factum.*

In Debt upon a Bond, and the Defendant plead *Non est factum*, and the Jury find the Bond made joyntly by another with the Defendant, the Plaintiff shall have Judgment; for the Defendant should have pleaded this.

*Devise.*

If a Devise be pleaded absolute, if the Jury find a Devise upon a Condition Precedent, 'tis not good.

*Riens per Discent.*

In Debt against A. as Daughter and Heir to B. and the Defendant plead *Riens per discent* of B. and the Jury find that B. was seised in Fee and dyed, having Issue the Defendant his Daughter, and his Wife with Child of a Boy, who was afterwards born alive, and dyed one hour after, this Issue is found against the Plaintiff, because the Defendant had the Land as Heir to her Brother, who was last seised, and not to the Father, and so the Defendant had not the Land by Discent from the Father, but from the Brother, yet this is Assets in her Hands if it had been specially pleaded.

*Error.*

In a Writ of Error brought by him in remainder in Tail to Reverse a Fine, if the Defendant plead in bar of the Writ of Error, a Common Recovery by the Tenant in Tail; to which the Plaintiff replies, That at the time of the Recovery suffered, he himself was Tenant to the Practice, and so the Recovery void, upon which Issue is joyned, and the Jury find that he was Tenant of part, but not of other part. This Issue is partly found for the Plaintiff, and partly for the Defendant, so the Court shall proceed to the examination of the Error.

*Part.*

or, for that whereof he was found no Tenant; but 'tis a good bar of the Writ of Error, for that whereof he is found Tenant to the Præcipe.

In Assumpsit to pay Money upon request, Promise.  
and Issue upon this, if the Jury find the Plaintiff promised to pay the Money, but do not lay upon request, nor Modo & forma, this is not found for the Plaintiff.

In Ejectment of a Manor, if the Jury find that there were no Freeholders, and so 'tis no Manor in Law, yet being a Manor by Reputation, and so the Tenements pass by the Lease; therefore this Verdict is found for him who pleads the Lease of the Manor, for the substance is, whether any thing was demised or not. If the substance of the Issue be found, 'tis sufficient Manor.

In an Information of Extortion against Goal.  
the Goaler of the Goal, a Prison of the Castle of Maidston; the Jury found there was no Castle, but that there was a Goal; this was for the Plaintiff, because Goal is the substance.

If the Issue be whether the Defendant had Accompted before R. and W. Auditors assigned by the Plaintiff, and the Jury find an Accompt before R. only, the Issue is found for the Defendant; for the Accompt is the Effect of the Issue. Vide Rolls Tie. Tryal 707. &c. Accompt.

If eleven agree, and the twelfth will not, the Verdict of the eleven cannot be taken, but the Court may carry the Jurors with them in Cares until they are agreed. 41 Jury agree.  
Ass. 11.

Verdict altered.

A privy Verdict may be altered in open Court.

In an Extendi fac. upon a Statute, if the Jury deliver their Verdict in Writing, they may afterwards make it more formal, but they cannot alter it in substance, for it is a compleat Verdict by the delivery. So of Presentments, &c.

Fine and Non-claim.

A Fine pleaded in Bar, and that after the death of A. scil. 1 August, 3 Car. B. whether of the Plaintiff was alive, & in plena vita & remansit infra hoc Regnum infra quatuor Maria, &c. apud W. in Com. D. and no Entry or Claim within five years after, and the Plaintiff replies and takes Issue, Quod il non fuit & remansit infra hoc Regnum Angliæ modo & forma, &c. And the Jury find Quod non fuit & remansit infra hoc Regnum Angliæ, 1 August, 3 Car. but that he was there 1 Maij, 4 Car. and remained there a Month, and refer to the Court, An fuit & remansit infra hoc Regnum modo & forma, &c. This Issue is found for the Defendant, for the matter and substance of the Plea is, whether he was within the Realm after the death of A. and five years before Entry or Claim per him or the Plaintiff, and modo & forma shall not make the day material. Rolls Tit. Tryal 713.

Judgment, Arrest, at what time.

Judgment upon a Demurrer, and a Writ of Inquiry executed at the return, the party may shew any thing in Arrest of Judgment; for Judgment is not compleat until the last Judgment. The first is but an Award: A Man may plead any thing in Arrest of Judgment after a Verdict, which

which will make Error, if the Judgment be given.

In Debt upon a simple Contract against an Executor, if he will not plead in Abatement, but other matter which is found against him, he shall not afterwards alledge that he is not chargable in Arrest of Judgment.

So in Debt against Executors upon Arrarages of Accompt, where they are not chargable.

That which appears ill upon the same Record, but not a matter of Fact, which both not appear upon the Record, because the parties cannot by the Issue. As that Juroz was challenged, and yet served on the Tales, for this cannot appear without alledging matter of Fact. Nor that the Defendants Attozny had no Warrant. But if there be any irregular or foul practice, this may be offered to set aside Judgment.

What may be alledged.

In Error upon Judgment in Durham, in Debt upon Bond to pay twenty pounds, The Defendant pleaded solvit ad diem, not saying where; a Verdict thereupon is void, because there is no Visne, and so no Tryal. Keeble 2 part, 620.

visne.

If any thing be omitted in the Declaration, or if more is put in the Declaration than is found by the Jury, if it make a material Variance betwixt the Par. and the Verdict, the Action shall abate.

Variance between the Verdict and the Declaration.

These following are adjudged material variances.

Words.

If the Declaration be for these Words: Thou procuredst eight or ten of thy Neighbours to perjure themselves, and the Jury find that he said, Thou hast caused eight or ten, &c. for he might be a remote cause, licet causa sine qua non, without procurement. *Nar.* He is a Bankrupt. *Verdict.* He will be a Bankrupt within two days. *Nar.* He is a Thief. *Ver.* He stole a Horse. *Nar.* Thou art a Murderer. *Ver.* He is, &c. *Nar.* I know him to be a Thief. *Ver.* I think him to be a Thief.

Promise.

So it is material Variance, if a special promise be laid to be upon Request, and the *Verdict* find it without Request. So if the Declaration be upon a Lease made by two or by Baron and Feme, and the Jury find that one of them had nothing in the Land, or that the Baron only made the Lease, or that the two were Tenants in Common, and so several Leases, otherwise if they were Copartners.

So in Case that the Testator was indebted to the Plaintiff in fifty five pounds, and the Defendant being Administrator in consideration, &c. promise to pay this, upon non Assumpsit, if the *Verdict* find the promise to be to pay thirty pounds, part of the fifty five pounds.

Ejectment.

So in Ejectment, if the *Nar.* be of a Lease of three Acres, a Lease of a Piece will not maintain the *Nar.*

Wast.

So in Wast, for cutting Trees, and the *Verdict* find that he eradicated the Trees, but did not cut them.

A Prescription in modo decimandi, That Prescription.  
 Every one who hath seven Lambs, or under  
 seven, shall pay to the Parson ob. for every  
 Lamb, and the Jury find that; and farther,  
 That if he had more than seven Lambs, he  
 should pay a Lamb; and that the Parson  
 should pay the Parishioner ob. This is  
 not the same Prescription, but makes a va-  
 riance.

But if there be a Variance between the Variance.  
 Verdict and the Nar. either by way of sur-  
 plus or defect; but if this matter of Vari-  
 ance be not material in the extenuation of  
 the Action or Damages, the Action shall lye  
 notwithstanding the Variance.

These ensuing are adjudged not to be  
 material.

Par. Strong Thief. Verdict. Thief. Par.  
 Nay, &c. Ver. I affirm, or I doubt not. Par.  
 The Plaintiff will do such a thing. Ver. I  
 think in my Conscience he will, &c. Nar. Of a  
 Lease by a Parson for five years; if he tam  
 diu should be Parson, & tam diu viveret. And  
 the Verdict find the Lease to be for five years,  
 if he tam diu viveret without the words, and  
 should continue Parson; for the Law imply-  
 eth, That if he be deprived or resign, that  
 the Lease determines. Par. He is a Murderer.  
 Ver. He was a Murderer; for when he says,  
 he is a Murderer, 'tis not intended, that he  
 did the Act in presenti, but before. So in  
 Trespasses or Actions upon Torts and wrongs  
 which are several, If the Verdict find part  
 tis no material variance; and the Plaintiff  
 in these Cases shall have Judgment. Roll. tit.  
 Tryal 720.

Inquest by  
default.

A Jury of Middlesex was demanded in the Common-Pleas, the first day of the Term, and some appeared, and some not, so that here was not a full Jury, and neither the Defendant nor his Attorney did appear, and therefore the Plaintiff prayed, that the Inquest might be awarded by default, and by the Opinion of Welsh and Dyer, his prayer shall be granted, and the Custos Brevis, and all the Prothonotaries said the course was so, for the parties are demandable before the Jury, and if the Plaintiff make default, he shall be Consulted; and if the Defendant make default, the Jury shall be awarded by default, whether they appear or not. Dyer 265.

What the Defendant loses by his default.

Where an Inquest is taken by default, the Defendant shall lose his Challenges, and by 28 Ass. p. 42. Tit. Enquest in Fitz. he shall lose his Evidences also. Bro. Enquest. 10. quod non est lex.

When the Defendant may be condemned by default, and when an Inquest must be taken upon the default.

Det. The Defendant pleaded a Release, and the Plaintiff replied non est factum, and at the day of the Venire facias the Defendant made default, and the Inquest was taken upon his default, and found for the Defendant, for which the Plaintiff took nothing by his Bill; and yet if the Plaintiff had prayed it, he might have had the Defendant condemned by his default before the taking of the Verdict, Et sic vide folly in le Plaintiff. Bro. lb. 5. But upon such Release and default in Trespass, the Inquest shall be taken by default, and the Defendant shall not be condemned by default, though the Plaintiff pray it, and the reason is

, because the Debt is certain, and the Damages are incertain in Trespals, Bro.

3.

And Finch f. 409. hath well collected out of Brook, That always in an Action of Trespals, whatsoever the Issue be, Release, Justification, &c. and also in Debt, Detinue, Account, and the rest which are for things in certainty, if the Issue be taken upon a matter in fact only, as payment, that an Acquittance pleaded in Bar by the Defendant was made by Oath, &c. The Verdict shall be taken by default, if the Defendant makes default; but in the last recited Actions of Debt, &c. if the Issue be upon the Acquittance it self, Release, or other matter in writing, the Plaintiff may pray judgment upon the Defendants default, if he will; but if he do not pray it, the Jury shall be taken by default, as in an Action of Trespals.

The Jury may give a Verdict without testimony, or against testimony, when they themselves have conscience of the Fact. Flo. Com. 86.

Verdict without, or against testimony.

The Jury are to find Costs and Damages in Debt, Trespals, Ejectment, Rousance, Covenant, &c. Debt for Tythes, treble value of the Tythes, and no Costs nor Damages.

In Audita Querela sur Statute, The Issue and value of the Land.

Waste, Treble Damages.

**Quare Impedit.** 1. Whether the Church was void by the death of the Incumbent. 2. Whether it be now full or not? If it be full, at whose Presentation? And if the Months be past since the last aboydance, and of what value it is by the year? and what Costs and Damages?

**The Verdict.** In Dower, Inquiratur si vir obierit seizitus de tenementis præd. in dominico suo ut de feodo, aut de feodo talliat. Et si ita inveniunt, tunc quantum tenementa illa valent per annum in omnibus exitibus ultor reprisas, juxta verum valorem eorund. & quantum tempus dilabitur a tempore mortis præd. viri, & quæ dampna petens sustinet tam occasione detentionis datæ quam premissorum.

**En Dower Nota.** The Jury finding the dying seised, they must assess Cost and Damages, but if they find the Husband was seised, but did not dye so, then no Costs nor Damages, but only the value of the Land.

**In Detinue,** Si pro quer. de valore rei detent. & custag. & dampna.

**In Replevin,** Damages for both Parties and Costs.

**In Account,** No Damages no Costs.

**In placito terræ.** Nulla dampna nec custag. **Warrantia Chartæ Consimile.**

**Assise Consimile.**

**Prohibition,** Si pro quer. tum enquir. de exitibus & non plus.

**Partitione facienda,** Si pro quer. tunc de exitibus & non plus.

En brief de Entry in le per. Custag. & mpna.

In all real Actions generally no more in the Issue.

In Replevin, If the Plaintiff be called and do not appear, the Court takes the Verdict for the Defendant, and the Jury assess Damages and Costs. But Nota, that a Verdict is not usually taken in other Actions after the Plaintiff is Non-suit. *Werfin 2 part, 155.*

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## C A P. XIV.

How the Jury ought to demean themselves, whilst they consider of their Verdict; when they may Eat and Drink, when not; what Misdemeanor of theirs will make the Verdict void: Evidence given them when they are gone from the Bar spoils their Verdict: For what the Court may Fine them, and when the Justices may carry them in Carts, till they agree of their Verdict. An Amercement Afforded by the Jury.

Jurors ought  
not to eat or  
drink.

**T**here is a Maxim, and an old Custom in the Law, That the Jury shall not eat nor drink after they be sworn, till they have given their Verdict, without the Allowance and Licence of the Justices; and that is ordained by the Law for eschewing of divers inconveniences that might follow thereupon; and that especially if they should eat or drink at the Costs of the Parties; and therefore if they do so, it may be laid to their Arrest of Judgment.

But with the assent of the Justices they may both eat and drink; as if any of the Jurors fall sick before they be agreed of their Verdict, so soon that he may not commu-

the Verdict, then by the assent of the Justices he may have meat or drink, and also other things as be necessary for him, his fellows also at their own costs, or the indifferent costs of the Parties, if they so agree, or by the assent of the Justices they both eat or drink: and if the Case happen, that the Jury can in no wise agree in their Verdict; as if one of the Justices knoweth in his own Conscience the thing to be false, which the other Jurors term to be true, and so he will not agree with them in giving a false Verdict, and it appeareth to the Justices by examination, the Justices may in such case suffer the Jury to have both meat and drink for a time, to see whether they will agree. And if they will in no wise agree, the Justices may take such order in the matter as shall seem to them by their discretion to stand with reason and conscience, by awarding a new Inquest, and by setting Fine upon them, that they shall find in default, or otherwise as they shall think best by their discretion; like as they may do if one of the Jury dye before the Verdict, &c. Doct. Student. 158.

For by assent of the Parties they may eat and drink.  
Dr. Jurors.

New Inquest when the Jury cannot agree.

If the Jury after their Evidence given to them at the Bar, do at their own charges eat or drink, either before or after they be agreed on their Verdict, it is finable, but it shall not avoid the Verdict; But before they be agreed on their Verdict, they may eat or drink at the charge of the Plaintiff, if the Verdict be given for him, it shall avoid the Verdict, but if it be given

Where, if the Jury eat or drink, it shall avoid the Verdict, and where only finable.

ven for the Defendant, it shall not avoid it; Et sic e converso. But if after they be agreed on their Verdict, they eat or drink at the charge of him for whom they do pass, it shall not avoid the Verdict. 1 Inst. 228.

To give the Jury Mony, makes the Verdict void by two Justices. Leon. 1 p. 18.

What delivered to the Jury after Evidence, shall avoid their Verdict. Littletons Rep. 69. Keeble 1 part, 824.

If the Plaintiff after Evidence given, or the Jury departed from the Bar, or any of them do deliver any Letter from the Plaintiff to any of the Jury, concerning the matter in Issue, or any Evidence, or any Crowl touching the matter in Issue, which was not given in Evidence, it shall avoid the Verdict, if it be found for the Plaintiff but not, if it be found for the Defendant. Et sic e converso. But if the Jury carry away any Writing unsealed, which was given in Evidence in open Court, it shall not avoid their Verdict, albeit they should not have carried it with them. Ibid.

How the Jury ought to be kept by the Bayliff.

When they may eat and drink. See Smiths Common-wealth. 74.

By the Law of England, a Jury after their Evidence given upon the Issue, ought to be kept together, in some convenient place, without Meat or Drink, Fire or Candle (which some Books call an imprisonment) and without speech with any one, unless it be the Bayliff, and with him only, if they be agreed. After they be agreed they may in Causes between party and party, give a Verdict, and if the Court be risen, give a privy Verdict before the Judges of the Court, and then the

may eat and drink, and the next morning open Court, they may either affirm, or alter their privy Verdict, and that which is given in Court shall stand. But in Criminal Cases of Life or Member, the Jury can be no privy Verdict. Where there can be no privy Verdict. they must give it openly in Court.

A privy Verdict may be taken in a Quo Warranto, Perjury, or wherever the King's party, unless in case of life and death. See 3 part, 459.

Neither can a Jury sworn and charged in case of Life or Member, be discharged by the Court, or any other, but they ought to give a Verdict. And the King cannot be Non-suit, for he is in Judgment of Law whether present in Court; but a common person may be Non-suit. And in civil Actions the Justices upon cause may discharge the Jury. Br. Enquest. 68. 47. 39. &c.

Where the Jury cannot be discharged before Verdict. The King cannot be Non-suit.

In an Information by an Informer, qui tam, &c. the Informer may be Non-sued, Inst. 139. Cokes Entries, Tit. Information, 394.

But this is against common practice; Information: and I have known, that after a Jury of Life and Death have been sworn, and charged with Prisoners Arraigned, the Judge having been credibly informed, That it was a Jury pack't to favour some Prisoner, has discharged that Jury, and made the Sheriff return another presently.

In Hillary Term, Sexto H. 8. Rotul. 358. It was alledged in arrest of the Verdict at the Nisi prius, That the Jurors had eat and drunk. And upon examination it was found,

Jurors fined.

that they had first agreed, and that returning to give their Verdict, they saw the Chief Justice in the way going to see a Fry, and they followed him, Et in veniendo derunt cyplum & inde biberunt. And for this every one of them was fined 40 d. And the Plaintiff had Judgment upon the Verdict. Dyer 37.

Jurors at the Nisi prius, fined in Bank, for eating Pears and drinking Ale.

And Dyer 218. At the Nisi prius, the Jury after their charge given, returned and said, That they were all agreed except one who had eat a Pear, and drunk a draught of Ale, for which he would not agree; and at the request of the Plaintiff, the Jury was sent back again, and found the Issue for the Plaintiff. And the matter aforesaid being examined by the Datch of the Jurors Separatim, and the Bayliff who kept them, and found true; the Offender was committed, and afterwards found Surety for his Fine. Si, &c. And Fitzherbert, the then Justice of Assise, gave him day in Banco, &c. At which day a Fine of twenty shillings was there assessed. Et quoad Ball. Curia advisare vult.

Fined for having Figgs and Pippins about them.

In Trespals by Mounson against Wel, the Jury was charged, and Evidence given, and the Jurors being retired into a House for to consider of their Evidence, they remained there a long time without concluding any thing, and the Officers of the Court who attended them, seeing their delay, searched the Jurors, if they had any thing about them to eat; upon which search it was found that some of them had Figgs, and others Pippins, for which the next day the matter was moved

removed to the Court, and the Jurors were examined upon Oath, and two of them did confess, that they had eaten Figs before they had agreed of their Verdict; and three other of them confessed, that they had Pip-pins but did not eat of them, and that they did it without the knowledge or will of any of the parties. And afterwards the Court set a Fine of 5 l. upon each of them which had eaten, and upon the others which had not eaten 40 s. But upon great advice and consideration had, and conference with the rest of the Judges, the Verdict was held to be good, notwithstanding the said misdemeanors. Leon. 1 part, 133.

And see the Book of Entries, 251. The Jurors after they went from the Bar, advise the Comed-runt quoddam species, scil. Raisins, Dates, &c. at their own Costs, as well before as after they were agreed of their Verdict. And the Jurors were committed to Prison, but their Verdict was good, although the Verdict was given against the King.

Fin'd for eating Raisins and Dates.

In Ejectione firmæ, it was found for the Defendant, three of the Jurors had Sweet-meats in their Pockets, and those three were for the Plaintiff, until they were searched and the Sweet-meats found, and then disagreed with the other nine, and gave Verdict for the Defendant. It was the Opinion of the Justices, That whether they eat or not, they were finable for having of the Sweet-meats with them, for that is a very great misdemeanor. Godbolt 353.

Finable for having Sweet-meats, &c. about them, though they do not eat them. See Plo. Com. 519. One fined and imprisoned for having Sugar-Candy and Liquorish about him.

Jurors Carted.

40 Assise. Placito 11. The Justices said That if the Jurors will not agree in their Verdict, the Justices may carry them in a Cart along with them, till they are agreed.

The same Evidence given to the Jury, after they were gone from the Bar, spoils the Verdict.

The Jury were gone from the Bar, to confer of their Verdict, and one of the Witnesses before sworn on the Defendants part was called by the Jurors, and he recited again his Evidence to them, and after they gave their Verdict for the Defendant. An complaint being made to the Judge of the Assises of this misdemeanour, he examined the Inquest, who confessed all the matter, and that the Evidence was the same in effect, that was given before, Et non alia nec diversa. And this matter being returned by the Postea, the Opinion of the Court was That the Verdict was not good, and a Venire facias de novo was awarded. Cro. lat. part, 189.

Trinity Term 1653. between Wells and Tayler, Copies of a Bill, Answer and Depositions were proved, but not all read and delivered to the Jury, who carried them with them from the Bar in a bundle, which they laid by them and did not look on; yet their Verdict at the Bar, was set aside for this cause, and the Court would not regard their saying, that they did not read them, for they might say that to save themselves; it being a fault to take any thing without the Courts knowledge.

If the Names of the Jurors be transposed in the Pannel of the Hab. Corp. As those which were first in the Pannel of the Venire fac. be set last in the Hab. Corp. 'tis good cause for a new Tryal. So held in the Exchequer, 1694.

If the Venire be returned but not filed, the Pannel may be changed, but by Windham, not reasonable the Jury returned should be changed without motion. Keeble 1 Vol. 562.

If one of the Parties say to the Jury after they are gone from the Bar, You are weak Men, it is as clear of my side as the Nose in a Man's Face. This is new Evidence, for his affirmation may much persuade the Jury, and therefore shall quash the Verdict. If a Party speak to them.

So if any of the Parties Servant speak to the Jury, and the Verdict goes for his Master, it may be quashed, but if for the other side, 'tis only fineable. Keeble 300. 1 part.

So if any thing be read to them, which they ought not to have with them, as a Book of Depositions, some whereof were read in Evidence. Prat's Case, 21 Jac.

The Plaintiff delivered an Escrowl to a Juror impannelled, before he was sworn, who afterwards being sworn, and gone with the Jury from the Bar, to consider of the Verdict, shewed the same Escrowl to his Companions, who found for the Plaintiff. The Minister who kept the Enquest, informed the Court hereof, and the Jury being examined, confessed the matter aforesaid,

Escrowl delivered to a Juror before he was sworn, violates the Verdict.

said, upon which Judgment was stayed; for after the Jury are sworn, they ought not to see nor carry with them any other Evidence but what was delivered to them by the Court: afterwards the Plaintiff said, That the Escrowl proved the same Evidence which was given to them at Bar by him; wherefore it was not so bad, as if it had been new Evidence not given before: Sed non allocatur. 11 H. 4. 17.

Church-Book  
delivered to  
the Jury, at  
of Court.

Pasche 38 Eliz. Inter. Vicary and Farthing, at the Nili prius. The Issue was about Non-Age, and two Church-Books were given in Evidence, one whereof was delivered to the Jury in Court, by the assent of Parties, and afterwards the other was delivered to the Jury out of the Court, by the Solicitor of the Plaintiff, without the assent of the Court, and a Verdict for the Plaintiff, and this was indorsed on the Postea; The Question was, whether this should make the Verdict void or no, for the Justices differed in Opinion, Popham and Gawdy, that it should not; Fenner and Clench, that it should; the Negative Justices gave these Reasons; That the Book was delivered in Evidence in the Court, and so the other Party might answer to it, and that the Court had informed the Jury of the validity thereof, how far they were to believe it, with many other Reasons: but the affirmative was urged, because there might be some matter in this Book, to induce them otherwise than was intended before, and because it was delivered on his part, for whom the Verdict passed, without the Courts assent;

ent; yet one Book (scil. Cro. last part 411.) tells us, Judgment was afterwards given for the Plaintiff. See More's Reports 452. The Books differ, for Cro. makes Clinch give his Opinion for the Verdict. But More brings him on the other side, which I conceive is truest; and for my part, I know no reason why foisting of Evidence to the Jury, without the Court, should have any labour at all.

In the Case of Taylor and Web, Trin. 1653. B. R. Twisden moved to set aside a Verdict given at War, because that after Evidence when the Writings were delivered to the Jury, some Writings which were not sealed (and therefore ought not to be delivered to the Jury) were delivered by a Stranger to the Jury. Consider the Reasons in the former cases.

Hales Counsel of the other side, produces an Affidavit of the Foremans of the Jury, that they made no use of them in giving their Verdict, and that most of those Writings were read in Court in Evidence upon the Tryal, and Hales said, That if this should avoid the Verdict, then that would be in the power of any Stranger unknown, and against the mind of the Parties to avoid any Verdict.

Rolls Chief Justice. The Affidavit of the Jury ought not to be allowed to make good their own Verdict, for now they are (as it were) Parties, and have offended, and shall not be allowed by their own Oath to take off their Offence, and it is the Duty of the Jury to look what Writings they receive before they go from the War; and if

if any such Paper be wrap'd up among other Papers delivered to them by the Court, so soon as they have discovered it, they should call in the Tip-staff, who keeps them, and deliver it to him, and to testifie they made no use of it, and he said it would be dangerous to give the least way to the delivering of any Writings to a Jury.

And at another day Rolls cited 11 H. 4. 18. the Plaintiff (before the Tryal) delivered a Breviat of his Evidence to the Jury, which contained no more than was proved in Court, yet by this the Verdict was avoided; So Mich. 31 Eliz. C. B. Metcalf and Dean, After the Jury were gone from the Bar, they sent for one of the Witnesses and re-examined him, who gave the very same Evidence that he had before given in Court, yet the Verdict was avoided; and the reason of both is, a fear and jealousy that other matters might be given, &c.

37 Eliz. Farthings Case, a Paper not under Seal, which was given in Evidence, was delivered to the Jury, this did not avoid the Verdict because here can be no such fear; and per Roll, If any Writing (though not given in Evidence) be delivered to the Jury by the Court, it shall not avoid the Verdict. And in the principal Case the Verdict was avoided.

Escrowl from  
one who was  
no party.

Hill. 40 Eliz. Rot. 847. In Arrest of Judgment after Verdict, it was alledged, that a Juror delivered to his companions, an Escrowl for Evidence to them, which was not given in Evidence at the Tryal, and adjudged no cause to Arrest Judgment, unless

less it had been received from one of the parties, which did not appear. More 546. otherwise if it had been given by a party, and the Jury had found for him.

In the Case of Duke and Ventres, Mich. 56. B. R. tryed at War, one Mr. Beverly Suffolk a Barrister was returned of the Jury, who (having been at a Tryal of the same Cause above twenty years before, in the Exchequer, and heard there great Evidence to make a Deed fraudulent, which was now the contest) demanded of the Court, whether he ought to inform the rest of the Jury privately of this, or conceal it, or declare it in open Court: The Court ordered him to come into Court, and deliver his knowledge which he heard then privately (which Evidence was not now given, because the parties were dead) and so he did being not sworn again, but only upon the oath taken as a Jury-man.

And certainly, it is of dangerous consequence, to receive a Verdict against Evidence given, on supposal that some of the Jury knew otherwise, or on private Information given by one Jury-man to the rest, where it can't be cross-examin'd; and let such Jurors beware of Attaint, but the best way is as before) in open Court.

In a Writ of Error, the first Error as Jury adjourned was, That Termino Trin. twelve ed. Jurors, and no more, did appear. This ex assensu partium, was adjourned until Crastino Animar. on which day, two others came and were sworn, being of the first Panel.

The

The Court all clear of Opinion, That this is no Error, this being good enough they being all to be called again. Leon. 3 part, 38.

Juror depart.

If a Juror depart after he is sworn, he shall be Fined and Imprisoned, and by assent of Parties, another Juror may be sworn Bro. Jurors 46. Lib. 5. 40.

If a Man be non-suited after the Jury is ready to give their Verdict, the Court may cause the Amercement of the Plaintiff to be presently assayed by the Jurors. Lib. 39.

If a Jury give their Verdict by Lot, 'tis a Misdemeanor and cause of a new Tryal although in Prior and Powel's Case, Keeble Vol. 811. A new Tryal was denyed, because the Lot seemed there very innocent.

But see Keebles 3 part, 805. A Jury, on Affidavit, that they gave their Verdict on throwing cross and pile, were bound to appear to an Information, which 'tis said broke one of the Jurors Heart. Keeble 1 part 811.

The King  
against Mar-  
chant.  
Keeble 2 part,  
404, 404.

Upon a motion for a new Tryal on the Judges Certificate that the Verdict was against Evidence in Perjury. The Court said there could be no new Tryal, for against the King, and denyed it, but said the Certificate might mitigate the Fine.

Nota, The Court will not award new Tryals on the Jurors gain-saying their Verdicts, unless the Judge before whom it was tryed, conceived the Verdict to be given against Evidence. per Cur. 13 Car. 2. B. 9.

The Jury appearing and sworn in an information of Extorsion, The Court would not discharge the Jury upon a cessat processus, so the Attozny General used the Clerk of the Crown to enter a *poli prosequi*.

## C A P. X V.

What Punishment the Law hath provided for Jurors offending; as taking Reward to give their Verdict. Of *Embraceors*. *Decies tantum*. Attaint. Several Fines on Jurors. What Issues they forfeit, and of Judgment for striking a Juror in *Westminster*, &c.

WE have already heard how the Court may Fine the Jurors for their misdemeanors in giving up their Verdict, I will proceed in shewing what punishments they are liable unto, if they neglect their duty; and doubtless no Men have more need of knowing what Penalties the Law inflicts on their Offences, than common Jurors, who too often being pre-engaged with favour to the Plaintiff, or malice against the Defendant, Et sic e converso; or with common interest (as they call it) where Tythes or commons are in question, will neither

P heark

hearken to their Evidence, nor direction of the Judge, but subvert the whole drift of the Common Law, which will have them of the Neighbour-hood where the Fact was committed, to the end that they knowing most of the Fact, may consequently give the best Verdict; yet contrariwise, Jurors which live nearest, do now a days meet commonly so fetter themselves with favour or animosities to the Parties; that those which live farthest off (as Juries from other Counties) for the most part give the clearest Verdicts. And how should the Judges remedy this mischief, but by severely punishing those Juries which offend: the Law in this will be their guide, for without doubt (excepting Life and Member) the Law hath provided more severe punishments against Juries, than against any other Offenders whatsoever, as well knowing that corruptio optimi est pessima: And common Juries generally have nothing to do with this verse, Oderunt peccare boni, virtutis amore, Therefore 'tis fit they should be concerned in the next, Oderunt peccare mali, formidine poenae; wherefore the description of what this poena is, shall be the conclusion of this Treatise.

The Penalty  
of Jurors tak-  
ing Rewards.

If any Juror take a Reward to give his Verdict, and be thereof attainted, at the suit of other than the party, and maketh fine, he which sueth shall have half the fine, and if any of the parties to the Plea, bring his Action against such Juror, he shall recover his damages. And the Juror so attainted shall have Impisonment for one Year, which

Imprisonment shall not be pardoned for  
any fine: This is by the Statute of 34 E. 3.  
cap. 8.

5 E. 3. Cap. 10. It is accorded, That if shall not serve  
of any other  
Inquest. any Juror in Assises, Juries or Enquests, take  
the one party, or of the other, and be  
hereof duly attainted, That hereafter he  
shall not be put into any Assises, Juries, or  
enquests; and nevertheless he shall be com-  
manded to Prison, and further ransomed at  
the Kings will. And the Justices before  
whom such Assises, Juries and Enquests,  
shall pass, shall have power to enquire and  
termine according to this Statute.

Imprisoned  
and ransomed,  
(that is) fined.

A Man would think that these Statutes  
would have frightened any Juror from taking  
rewards to give his Verdict. But

----- Quid non mortalia pectora cogis  
Auri sacra fames?

So sacred is this love of Money, that Con-  
science her self must vail to it, and not stand  
in competition with such allurements: where-  
fore the Law did redouble its force; nay  
more, produced a Decies tantum, scil. That a  
Juror taking Reward to give his Verdict,  
shall pay ten times as much as he hath ta-  
ken; which forfeiture, methinks, should  
strike even those who love Money best, re-  
solving to take Money upon such an account,  
because it is like a Canker in their Estates,  
giving them in the end, of ten times more  
pain than it brought; for which, hear the Statute  
E. 3. Cap. 12.

Decies tantum.

Embraceor.

Item, As to the Article of Jurozs, in the 24th year, it is assented and joynd to the same, That if any Jurozs in Assises Sworn and other Inquests to be taken between the King and party, or party and party, any thing take by them or other of the party, Plaintiff or Defendant, to give the Verdict, and thereof be attainted by Process contained in the same Article, be it at the Suit of the party that will sue for himself or for the King, or any other person, each of the said Jurozs shall pay ten times as much as he hath taken: and he that will sue shall have the one half, and the King or other half; and that all Embraceors, who bring or procure such Inquests in the County, to take gain or profit, shall be punished in the same manner and form as the Jurozs. And if the Juroz or Embraceor be attainted, have not wherewith to make answer in the manner aforesaid, he shall have Imprisonment of one Year. And the issue of the King, of Great Men, and of the Commons is, That no Justice or other Minister, shall enquire of Office, upon any of the points of this Article, but only upon the Suit of the party, or of other, as afore is said.

Upon which Statute there is a Writ called a Decies tantum; and who will may bring it, for it is a popular Action, and lyes (as you see) where any of the Jurozs, after he is sworn, taketh of one party or of the other or of both (and then he is called an Ambldexter) any Reward to give his Verdict, &c. And it may be brought against all the Jurozs

• Ambldexter.

an Embraceor, although they take several  
sums of Money, and although the Jury  
give no Verdict, or a true Verdict. But it  
doth not lye against an Embraceor, if he taketh  
no Money, and embraces, or taketh Money,  
and doth not embrace. See Bro. Tit.  
Species tantum 13. and F. N. Br. 171.

An Embraceor is he that procures the  
Jurors in the Country, to take gain or pro-  
fit, or comes to the Bar with the party,  
and speaks in the matter, or stands there to  
survey the Jury, &c. or to put them in fear,  
or solicits them to find on the one side or  
the other, and this fellow cloaks his Embrace-  
ment, under pretence of labouring the Ju-  
rors to appear, and to do their Conscience: Attornies ill  
and thus the Attornies in the Country, of pra-  
ctice. -  
take upon them to do, and many times  
in a word or two for their Clients;  
which practice deserves the most severe pu-  
nishment, next to their getting of the She-  
riff to return such and such in the Jury,  
which they, having been under-Sheriffs them-  
selves, and so agree with one another, are  
most expert at.

But it was said by Rolls Chief Justice,  
that a Plaintiff might well intreat one Ju-  
or to appear, and that it was allowed in the  
Star-Chamber, but a Stranger could not la-  
bour one Juror to appear.

But Counsellors at Law may plead for Counsellors.  
their Money at the Bar, but they must not  
labour the Jury privately; and if they take  
Money for this, they are Embraceors, F. N.  
Br. 171.

So F. N. Br.  
saith, but for  
my part, I  
think he is  
mistaken, for  
the Statute  
mentioneth  
nothing of his  
taking Money;  
and in my opi-  
nion, the case  
of 37 H. 6. 13.  
is full against  
him.

Embraceor.

Fined for ta-  
king Mony  
after their  
Verdict.

So much doth the Law hate that Jurors should privately take Mony for their Verdict, That certain Jurors were fined, for taking Mony after their Verdict, though there was no pre-engagement for it. 39 Ass. p. 19.

The practice is otherwise at this day; if it were not, the Middlesex Juries would so court the Bayliffs to return them, especially to Tryals at Bar, where five pounds a Man is frequent Gratuity, sometimes more.

Issues.

If a full Jury appear, and some are challenged off; so that the Jury remains for default of Jurors, the Defaulters shall lose their Issues. 4 H. 6. 7. Otherwise if a Jury be sworn, and one is withdrawn by consent.

But if there be a joinder of Counties, and a Jury of one County appear, and not of the other; The Defaulters of that County from which enough came, shall not lose their Issues, because the Inquest doth not remain for their default, but for the default of them of the other County. 48 Ass. 5. Mer quere.

Amercement.

If the Jurors at the return of the Scire facias make default, yet they shall not be amerced, because the parties may be claimed at the first day, but at the return of the Habeas Corpora they shall. 10 E. 4. 19. 1 E. 3. 12.

Demand for  
peine.

If any of the Jurors appear, the Court may charge them to inquire if any of the other Jurors were within the Town after the return; and if they find they were, they shall

shall be demanded upon a Pein, and if they come not, they shall be amerced. Rolls Tit. Tryal 632.

A Juror was challenged, and six other Jurors were sworn to try the Challenge, who found him indifferent, and thereupon the Jury was demanded, but did not appear; for which default he was fined the value of his Lands for a year; and the other Jurors inquired of the value, &c. although the other party then would have challenged him when he was demanded, so that he might have been treit, but the Court would not admit this, because then the King would have lost his Fine. 36 H. 6. 27.

Juror fined for departing when he was challenged.

If a Juror appear, and is adjourned upon pain, and makes default, in this Case, because he shall be fined to the value of his Land per annum, this shall be inquired by his Companions of the Jury, because the Court knows not the value of his Land. Lib. 8. 41.

Juror adjourned upon pain.

A Verdict was taken from the Foreman of the Jury, to which one of them did not assent, and Damages assessed to twenty shillings, in Trespas and Assault; and afterwards, every one of the eleven were fined, for giving their Verdict before they were all agreed. 40 Afile 10.

Fined for giving a Verdict before they were agreed.

Where a Jury are to be fined, a fine joyntly imposed on them, is not legal, but they must be severally fined, because the Offence of one, is not the Offence of another. Et nemo debet puniri pro alieni delicto. For then it might be said, Rutilius fecit, Emilius plebitur. Lib. 11. 42.

The Fine must not be joynt.

Punishment  
for striking a  
Juror.

A Man struck a Juror at Westminster (sitting in the Court) who passed against him, and he was thereof Indicted and Arraigned at the Kings Suit, and attained, his Judgment was, That he should go to the Tower, and stay there in Prison all days of his Life, and that his right Hand should be cut off, and his Lands seised into the Kings Hands, 41 Aulse, p. 25. And now our Juror sees what punishment it is to strike him in the face of the Court, let him hold his Hands from others, lest the same Judgment light on him.

Issues.

By the Statute of 27 Eliz. Cap. 6. It is Enacted, That upon every first Writ of Habeas Corpora or Distringas, with a Nisi prius, Ten Shillings shall be returned in Issues, upon every person impannelled, and upon the second Writ, twenty Shillings, and upon the third thirty Shillings. And upon every Writ that shall be farther awarded to try any Issue, to double the Issues last, afore specified, until a full Jury be sworn.

Not summoned.

And these Issues being returned upon a Tenement in Fee-simple, in Tayl or for Life, of another, or of himself, or in the right of his Wife; the Land he then hath will be chargable for it, and any Mans Cattel upon this Land may be distrained for it.

But if the Under-Sheriff, &c. return a Juror summoned, who in truth was not legally summoned, and therefore doth not appear, and so loseth Issues, the Under-Sheriff shall pay him double the value of the Issues

Issues lost. See the Statutes of 35 H. 8. 6. and the 2 E. 6. 32.

And Note, The Law hath been so careful to punish all Offenders, who would endeavour to byass and corrupt the Jury; and to punish the Juries themselves, if they receive Money to give their Verdict, or any otherwise pre-engage themselves to any of the parties, all which is to the end that a true and honest Verdict may be given: What punishment shall that Jury have which gives a false Verdict?

Such a punishment, that (as I said before) in civil Causes it is without Example: and surely, if the Jurors did bear it in their minds, their Verdicts would be always grounded upon their Evidence; and not upon their own Interest, or any partiality to either of the parties.

Wherefore if the Jurors give a false Verdict (which is Perjury of the highest degree) upon an Issue joyned between the parties in any Court of Record, and Judgment thereupon, The party grieved may bring his Writ of Attaint, in the Kings-Bench, or Common-Pleas; upon which 24 of the best Men in the County are to be Jurors, who are to hear the same Evidence which was given to the Petit Jury, and as much as can be brought in affirmance of the Verdict, but no other against it. And if these 24 (who are called the Grand Jury) find it a false Verdict; then followeth this terrible and heavy Judgment, at Common-Law, upon the Petit Jury.

Attalor.

1. That

Judgment in  
Attaint.

1. That they shall lose *Liberam Legem* for ever, that is, they shall be so infamous, as they shall never be received to be a Witness, or of any Jury.

2. That they shall forfeit all their Goods and Chattels.

3. That their Lands and Tenements shall be taken into the King's Hands.

4. That their Wives and Childzen shall be thrown out of doozs.

5. That their Houses shall be rased and thrown down.

6. That their Trees shall be rooted up.

7. That their Meadow Grounds shall be ploughed up.

8. That their Bodies shall be cast into the Goal, and the Party shall be restored to all that he lost, by reason of the unjust Verdict. So odious is Perjury in this Case, in the Eye of the Common-Law; and the severity of this punishment is to this end, *Ut poena ad paucos, metus ad omnes perveniat*; for there is *Misericordia puniens*, and there is *Crudelitas parcens*. And seeing all Tryals of real, personal, and mixt Actions depend upon the Oath of twelve Men, prudent Antiquity inflicted this severe punishment upon them, if they were attainted of Perjury. 1 Inst. 294.

But now by the Statute of 23 H. 8. Cap. 3. The severity of this punishment is moderated, if the Writ of Attaint be grounded upon that Statute.

But

But the Party grieved, may at his Election, either bring his Writ of Attaint, at the Common-Law, or upon that Statute, wherefore let the Juror expect the greatest punishment, when he offends. 3 Inst. 163. 222.

And so I conclude as to the Jurors, only with the Words of Fortescue, Quis tunc (et si immemor salutis animæ suæ fuerit) non formidine tantæ poenæ, & verecundia tantæ infamiæ, veritatem non diceret sic Juratus?

Who then, though he regard not his Souls health, yet for fear of so great punishment, and for shame of so great Infamy, would not upon his Oath, declare the truth?

But as to our Practicer, I would give this one farther Advertisement, which relates also to Jurors.

When a Verdict has been given by a former Jury in the same Cause, and on the same Evidence, it is allowed to give the former Verdict in Evidence, and I have known this introduced by the Counsel, as obliging to the latter Jury, to find accordingly; intimating, that otherwise they do (in effect) perjure the former twelve Men, which may amuse tender minds, and draw them from the strict inquiry into the Merits of the Cause, in favour of their Predecessors, which is a palpable mistake and misinformation, for these Reasons.

1. The same Evidence in the former Cause and Tryal (perhaps) was not so perspicuously delivered as in this.

2. This

2. This latter Jury may be of more sagacious and comprehensive Judgment than the former.

3. The Directions of the Court (which the Jury most heed) may be more clearly delivered to this Jury.

4. The matter in Contest (perhaps) was not in the former Tryal so clearly manag'd by the Counsel, being not so well instructed as afterwards.

5. And Lastly, supposing the Evidence equally delivered by the Witnesses, apprehended by the Jury, directed by the Court, manag'd by the Counsel, yet its no Perjury or Fault to differ in Judgment; for if twenty four Jury-Men were to try a matter of Fact, and twelve were of one Opinion, and twelve of another, who is in Fault? while they Judge according to the best of their Knowledge and Skill, to which (only) they are sworn. And it's a reasonable kindness to Jury-Men, to make good Construction of differing judgments among them, while we see how oft Judges themselves differ in their Opinions, on a matter stated equally to them all, and that (not only as to matter of Law, but) as to matter of Fact, as attending Practicers may observe in Tryals at Bar, in the several Judges several Directions. And this I thought good to Advertise, for that I have known Verdicts gained on this unwarrantable Suggestion, against clear and expresse Evidence, and could instance some Cases. Sed verbum sat, &c.

As to the difference betwixt the Judge and the Jury, and that Question which has made  
such

such a noise, Viz. Whether a Jury is finable for going against their Evidence in Court, or the Direction of the Judge? I look upon that Question as dead and buried, since Bulhel's Case, in my Lord Vaughan's Reports; yet some of the Ashes thereof I may sprinkle here without Offence. It doth appear there to have been resolved by all the Judges, upon a full Conference at Serjeants-Inn, That a Jury is not finable for going against their Evidence, where an Attaint lies. And that it is evident by several Resolutions of all the Judges, That where an Attaint lyes, the Judge cannot Fine the Jury, for going against their Evidence or Direction of the Court, without other Misdemeanour.

And where an Attaint doth not lye, as in Criminal Causes upon Indictments, &c. My Lord Vaughan says these Words, That the Court could not Fine a Jury at the Common Law, where Attaint did not lye; I think to be the clearest Position that ever I considered either for Authority or Reason of Law. And one Reason for this (which can never be answered) is, The Judge cannot fully know upon what Evidence the Jury give their Verdict; for they may have other Evidence than what is shewed in Court. They are of the Vicinage, the Judge is a Stranger, they may have Evidence from their own personal knowledge, that the Witnesses speak false, which the Judge knows not of; they may know the Witnesses to be stigmatised and infamous, which may be unknown to the Parties or Court.

And

And if the Jury knew no more than what they heard in Court, and so the Judge knew so much as they, yet they might make different Conclusions, as oftentimes two Judges do; and therefore, as it would be a strange and absurd thing to punish one Judge for differing with another in Opinion or Judgment; so it would be worse for the Jury, who are Judges of the Fact, to be punished for finding against the direction of him who is not Judge of the Fact. But he that would be better satisfied in this point, may read that Case, and the Authorities and Reasons given by my Lord Vaughan, whom I must honour, as a Man of great Reason.

It is shewed in that Case, That much of the Office of Jurors, in order to their Verdict, is Ministerial, as not withdrawing from their Fellows after they are sworn; not receiving from either side Evidence after their Oath, not given in Court; not eating and drinking before their Verdict; refusing to give a Verdict, and the like; wherein if they transgress, they are finable: But the Verdict it self when given, is not an Act Ministerial but Judicial, and according to the best of their judgment; for which they are not finable, nor to be punished but by Attaint.

For can any Man shew, that a Jury was ever punished upon an Information, either in Law or the Star-Chamber, where the Charge was only, for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subornation, or the like, were joyned.

But the Fining and Imprisoning of Jurors for giving their Verdicts, hath several times been declared in Parliament an Illegal and Arbitrary Innovation, and of dangerous consequence to the Government; the Lives and Liberties of the People. This celebrated Tryal by Juries having been confirmed by many Parliaments.

Keeble 2 part,  
180. 1 part,  
169.

Littleton, Sect. 368. tells us, That as the Jury may find the matter at large, that is a Special Verdict, (which the Court cannot refuse, if it be pertinent to the matter put in Issue) and leave the Law to the Court, so if the Jury will, they may take upon them the knowledge of the Law upon the matter, and may give their Verdict generally, as is put in their Charge. As for Example, upon all General Issues; as Not Guilty, pleaded in Trespass, Nil debet in Debt, Nul tort, Nul disseisin in Assise. Ne disturba pas in Quare Impedit, &c. Though it be matter of Law, whether the Defendant be a Trespasser, a Debtor, Disseisor, or Disturber, in the particular Cases in Issue; yet the Jury find not (as in a Special Verdict) the Fact of every Case by it self, leaving the Law to the Court, but find for the Plaintiff or Defendant, upon the Issue to be tryed, wherein they resolve both the Law and the Fact complicate, and not the Fact by it self. And so upon Not Guilty to an Indictment of Felony, breach of the Peace, Trespass, &c. and other Cases where the Law and the Fact are complicate and joyned, they may determine upon both: Yet I must give them my Lord Coke's Caution, which is, That although the Jury, if they

Hardres Rep.  
409.

they will, may take upon them the knowledge of the Law, and give a general Verdict, yet it is dangerous for them so to do; for if they do mistake the Law, they run into the danger of an Attaint. Therefore to find the matter specially, is the safest way where the Case is doubtful.

And to end, as I began, That Decantatum in our Books (as my Lord Vaughan calls it) *Ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores*, literally taken is true; for if it be demanded what is the Fact? the Judge cannot answer it. If it be asked, what is the Law in the Case? the Jury cannot answer it. But upon the general Issue, if the Jury be asked the Question, Guilty or not? which includes the Law, they resolve both Law and Fact, in answering Guilty or Not Guilty. So as though they answer not singly to the Question what is the Law? yet they determine the Law in all matters where Issue is joyned and tryed, but where the Verdict is special. But in such Cases the Judge cannot of himself answer or determine one Participle of the Fact, but must leave it to the Jury, to whom let it rest and continue for ever, as the best kind of Tryal in the World for finding out the Truth; and the greatest safety of the just Prerogatives of the Crown, and the just Liberties of the Subject; and he which desireth more for either of them, is an Enemy to both.

F I N I S.

# PRECEDENTS

CONTAINING

The Forms of Challenges

TO THE

# ARRAY, &c.

AND THE

PROCEEDINGS thereupon.

*Pleas Puis le Darrein Continuance*, Demurrers upon the Evidence, Bills of Exception, &c.

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A Form of Challenge to the Array.

**E**T nunc ad hunc diem sciēt, &c. venit predict' A. Quer' & B. Defens p at-  
torat suos, & Juratores suos Impanellat &  
demand & venerunt, & inde predict' B. Ca-  
lumniasit Arratand pannell' p'ed quia, &c.

This must be read by the Councel in French, and delivered to the Clerk to read it in Latin.

A Challenge to the Array, because the Sheriff  
is Cousin, &c.

Et sup hoc idem Henricus Vernon calump-  
niat Arraiamentū pannellī pōit' quia dīc  
quod pannellū illud arriat fuit p quendam  
Johannem Zouch Militē jam & tēe Arrai-  
ment' p'ed fact' vic' p'ed Com' Derb' qui  
quidem vic' est consanguineus p'ed Johannis  
Maners viz. filij Georgij Zouch Ari filij Jo-  
hannis Zouch Mil' fil' Johannis Zouch Ari filij  
Johannis Zouch Ari filij Willielmi Domini  
Zouch filij Alan Domini Zouch filij Williel-  
mi Domini Zouch filij Elizabethæ filie Williel-  
mi Domini Roos Patris Willielmi Domini  
Roos Patris Thome Domini Roos Patris  
Elianore Patris Georgij Maners Militis Pa-  
tris Thome Comit' Rutland Patris p'ed  
Johannis Maners Et hoc paratus est sificare  
unde petit Iudicium ac quod pannellum p'ed  
cassetur, &c. que quidem calumnia p' p'ed Tho.  
Stanley dedic' p N. Sturley de Beachiff Ar &  
R. F. de T. Ar triatores ad hoc electos & sus-  
ratos compta est Ha Ideo pannellum p'ed  
cassetur, & amoveatur, &c. Cokes Entries,  
340.

A Challenge because the Sheriff is Tenant, &c.

Et sup hoc idem Johannes Dom' St. John  
dic' qd J.D.Ar vic' Com' pō jam existit quod  
que idem J.D.tenet duodecim acras p'ati cum  
p'itū in Budenham in Com' p'ed de ipso  
Johanne Domino St. John ad voluntatem p  
reddi 40 s. eidem Johanni Domino St. John  
an-

annuatim solvend Et ea de causa petit hñe  
Domine Regine de ve. fac. hic riscem, &c.  
ad triandum exitum pñ superius junct Coroz  
natoribus esuldem Domine Regine in Comd  
pñ dirigend, &c. Sup quo pñ Tho. dic  
qñ pñ Jo. D. non tenet pñ ris acras pñati  
cum pñid nec aliquam inde parcelle de pñat  
J. Domino St. John ad voluntat put idem  
Johannes Dominus St. John superius alle  
gabit Ideo non obstante Calumpnia pñ  
Jo. Domini St. John ad pñat vic Preceptum  
est eidem vic qñ ve. fac. hic, &c. Cokes Entries  
397.

A President of a Challenge for default of Hun  
dredors which hath been several times made  
use of at the Assise.

Et sup hoc pñ A. B. p C. D. Attorid  
suum veni & Calumpid Arraiament pannell  
pñ quia dic quod villa de Dale in Comd  
pñ in qua quidem villa causa Actionis ori  
tur & in narratione pñ quer locat & ori  
supponit est & Tempore Arraiamenti pannell  
li illius fuit & adhuc existit infra hundred  
de Downs in Comd pñ quodqz modo vic  
Comd pñ non Retorid seu impannellabit  
aliquos hundredores de hundred de Downs pñ  
ad triand erit inf partes pñ modo junct nec  
Jur modo Impannellat & retorid habent seu  
aliquis eorundem Jur habuit vel modo has  
bet aliquas Eas seu tenementa infra hun  
dred de Downs pñ nec habent habuer seu  
aliquis eorundem Jur habuit tempore Ar  
raiamenti pannelli pñ seu unquam antea  
vel postea seu habitant vel commorant aut  
aliquis

aliquis eorundem habitabat vel commoratur  
infra hundredum per modo vel Tempore Arrai-  
amenti pannelli illius Et hoc parat est ve-  
rificare unde per Iudicium Et quod pannel-  
lum illud Cassetur, &c.

This must be under Councils Hand, and the  
Proceedings herein you may read before ; if they  
Demur, thus,

Moratur in Lege  
W. T.

Joynder in Demurrer  
G. D.

The Form of a Challenge made by the Defen-  
dant, because the Plaintiff is the Sheriffs  
Cousin.

Et sup hoc predictus Defendens per A. B.  
Attoꝝ suum veni & Calumpniat Arraiement  
pannelli predicti quia dicit quod pannellum illud  
factum & arraiatum fuit per C. D. At modo & Tem-  
pore Arraiamenti pannelli per dicit Comitem predictum  
qui quidem dicit est Consanguineus E. H. genitor  
modo dimissoris querit in narratione per dicit querit  
mentionat videlicet filius G. H. genitor filius K. L.  
filie M. N. filius O. P. Patris Q. R. Patris  
predicti E. F. modo dimissoris querit in nar predicti  
nominat Et hoc parat est verificare unde per  
Iudicium & quod pannellum illud cassetur, &c.

If the Plaintiff deny the Kindred and Affini-  
ty, then thus,

Nient Cousin par le manner  
W. T.

est Cousin  
G. D.

Then

Then are two or more Triors sworn, but seldom more than two, and (after they have heard the Proofs and Evidence given to make good the Defendants Plea) they give their Verdict accordingly.

Note the Plaintiff may, if he please, Demur upon the Challenge.

A Challenge to the Array, because no Knight was returned upon the Jury.

*Et sup hoc predictus Comes p A. B. At-  
torid suum ven & Calumpid Arraiament  
pannelli Assise pzed quia dic qd ipe est &  
Tempore Arraiamenti pannelli illius & an-  
tea fuit & adhuc est un magnat & parium  
hujus Regni Angliæ & vocem & locum in  
quolibet Parlamento ejusdem Regni ha-  
bens Et qd Arraiament Assise pannelli pzed  
Arraiat fuit p C. D. Mil nuper vic pzed  
Comd E. nullo Milite in eodem pannello  
Arraiament illius niat & retorid existend  
sicut esse debuit secundum legem hujus Reg-  
ni Angliæ & hoc parat est verificare unde  
pet Judic Et quod pannellum illud Cas-  
setur, &c.*

*Vies Tiel Challenge in le liure de Mon-  
sieur Plowden, & Demurrer sur ceo, joinder  
in Demurrer & Judgment que le pannel  
soit casse en le Case del Count de Darbie,  
fo. 117.*

A Challenge against the Sheriff for Returning the Jury at the Instance, Request and Denomination of the Plaintiff.

**Et sup hoc eadem A. B. p C. D. Attord suum ven & Calumpn Arraiament pannelli ejusdem Jure quia dic qd pannellum illud fact & arraiat fuit p E. H. M<sup>r</sup> modo hic Com<sup>r</sup> p<sup>r</sup>es & Ministros suos ad denominationem & promotionem ipsius quer in favorem ejusdem quer & hoc parat est verificare, unde pet J<sup>u</sup>dice & quod pannellum illud cassetur, &c.**

To which the Plaintiff may plead that the Array of the Pannel p<sup>r</sup>es bene & equalit factum & arraiat fuit p p<sup>r</sup>edictum hic & Ministros suos, &c. juxta officij sui debet.

Or the Plaintiff, if he will, may confess it: But if he plead, then the Judges immediately assign Tryors to try the Array, which seldom exceed two, who being chose and sworn, the Associate or Clerk in Court doth declare and rehearse unto them the matter and cause of the Challenge, and after he hath so done, concludes to them thus. And so your Charge is to enquire whether it be an even and Impartial Array, or a favourable one: And if they affirm it, then the Clerk enters underneath the Challenge,

**Affirmatur.**

But

But if the Triors find it favourable, then thus,

*Calumpnia vera.*

A Challenge because that the Town is within an Hundred of which the Plaintiff is Lord, and prays a Writ to the next Hundred.

Et sup hoc p̄t̄ A. dīc̄ quod p̄dicta villa de Dale in qua transgr̄ p̄t̄ facta fuit est infra hundr̄ de B. Et quod ipse est Dñs ejusdem hundr̄i quodque omnes lib̄ Tenentes infra hundr̄ illud sunt infra districtionem ipsius A. Et ea de causa p̄t̄ h̄d̄ Dom̄ Regis de venire faciend̄ hic r̄is, &c. ad triand̄ exitum p̄dictum de p̄or̄ v̄l̄d̄ in Com̄ p̄t̄ extra hundr̄ p̄t̄ ville de B. p̄or̄ adiacend̄ v̄c̄ Com̄ p̄t̄ dirigend̄ Et quia p̄t̄ Defendens hoc non dedit ei conceditur, &c. Ad p̄cept̄ est v̄c̄ quod venire fac̄ hic in Octab̄ sc̄i Hillarii r̄is, &c. de p̄or̄ v̄l̄d̄ in Com̄ p̄t̄ extra hundr̄ p̄t̄ p̄dict̄e ville de Dale p̄or̄ adiacend̄ p̄ quos, &c. Et qui nec, &c. ad Recogn̄, &c. quia tam, &c.

Challenge because the Sheriff and two Coroners are Tenants of the Plaintiff, and a Wen. fac. awarded to the rest of the Coroners.

Et sup hoc p̄t̄ A. B. dīc̄ quod tam p̄t̄ C. D. Miles nunc v̄c̄ Com̄ p̄t̄ q̄nd̄ F. F.

& G. H. duo Coronæ sunt Tenentes ipsius  
nunc I. & infra distractionem suam Et ex  
de causa pet. h're ipsius Domini Regis de Ven-  
fac. hic ris, &c. E. A. & R. P. resid. Coronæ  
eiusdem Domini Regis in Com. præd. diri-  
gend. ad triand. erit præd. & quia præd. W.  
hoc non debet ei conceditur, &c. Ad præc. E. A.  
& R. P. quod Men. fac. hic, &c.

Challenge where after the last continuance the  
Cousin of the Plaintiff is made Sheriff after  
Issue joyned.

Quia tam, &c. Ad quem diem hic vendi  
partes, &c. Et vic. non misit h're Et super  
hoc predictus Quer. dic. quod post ultimam  
continuationem placiti videl. post Dada  
lci Michs ultimo præfeto de quo die loquela  
præd. ult. continuat. fuit hic usque ad hunc  
diem scilicet tali die ultimo præfeto Domi-  
nus Rex nunc p. l'as suas parentes com-  
missit cuidam A. B. mlti custodiam Com. p.  
quarum quidem literarum paten. preterm.  
idem vic. Com. illius jam existit Quicun-  
dem A. B. est Consanguineus præd. quer. viz.  
fil. &c. Et ea de causa pet. breve Domini  
Regis de Venire fac. hic ris, &c. Coronæ Dic.  
Com. Regis Com. præd. dirigend. Et quia  
predictus Defendens hoc non dedit ei conce-  
ditur, &c. Et præc. est Coronæ Domini Regis  
Com. præd. quod Men. fac., &c.

Challenge because the Sheriff is of Council with the Plaintiff, and hath received Fees, and the Defendant doth deny the Challenge, therefore the *Venire facias* awarded to the Sheriff notwithstanding.

Et sup hoc predictus quer' die quod quidam A. B. vic Com' p'ed modo existit quidam A. B. est de consiliis ipsius quer' & habet de eodem quer' Annuum Redditum sive feod' xx l. Et ea de causa pet' h'c Dom' Regis de *Venire faciend' hic ris, &c.* Corond' Dom' Regis Com' p'ed dirigend' Et quia predictus defendens hoc dedic' Ideo non obstante allegatione p'edic quer' p'ec est vic, &c.

Challenge because the Plaintiff is Brother to the Sheriff.

Et super hoc idem querens die quod A. B. miles vic Com' p'dice existit & frater ejusdem quer' & ea de causa pet' h'c Dom' Regis de *Venire faciend' hic ris, &c.* Corond' die Dom' Regis Com' p'ed dirigend' Et quia p'ed defendens hoc non dedicit ei conceditur, &c. Ideo, &c.

Challenge where the Plaintiff is Sheriff, and one of the Coroners is his Tenant.

Et super hoc p'dic Quer' die quod ipse est vic Com' p'dic & quod sunt in eodem Com' Duo corond' videll' R. H. & R. D. quodque idem

Pasch. 24 H. 8.  
Rot. 138.

idem R. H. unus Corzon ejusdem Com<sup>itatus</sup> tenet de ipso quer' unum Messuagium, &c. p<sup>er</sup> fidelitatem & annuum reddit' singulis annis ad festa, &c. per equales porciones solvend'. Et eis de causis pet' h<sup>ab</sup>re Dom<sup>inus</sup> Regis de Venire fac' hic ris, &c. p<sup>ro</sup>fat R. D. att<sup>est</sup> Corzon Com<sup>itatus</sup> p<sup>re</sup>dictus dirigend' & quita, &c. conceditur Et p<sup>re</sup>cept' est eidem R. D. quod, &c.

Another Challenge to the same purpose.

Pasch. 20 and  
21 H. 8. Rot.  
424.

Et super hoc idem quer' dic' quod A. B. vic', &c. tenet decem acras terre cum p<sup>er</sup>tid' &c. de ipso quer' ut de Manerio, &c. p<sup>er</sup> fidelitatem, &c. Et ea de causa pet' h<sup>ab</sup>re ut supra.

Challenge because the Wife of the Plaintiff is Kin to the Sheriffs Wife.

Mich. 11 H. 7.  
Rot. 453.

Et sup hoc idem Querens dic' quod p<sup>re</sup>dicta Bridgitta nunc uxor H. I. modo vic' com<sup>itatus</sup> p<sup>re</sup>dicti consanguinea A. uxoris p<sup>re</sup>fat' quer' videll' filia M. sororis ipsius A. uxor' p<sup>re</sup>fat' quer' Et ea de causa pet' h<sup>ab</sup>re, &c. Corzon, &c.

Challenge because the Plaintiff is the Sheriffs Servant.

Et super hoc idem Quer' dic' quod ipse est serviens & de lib. R. T. militis modo vic' Com<sup>itatus</sup> p<sup>re</sup>dicti & ea de causa, &c.

Chal-

Challenge after the Jury Impannelled, return'd  
and called, because the Price in Aid is Sheriff,  
and of the Council of the Plaintiff, and a  
Distringas Jur with a 10 Tales Corond  
awarded.

Et modo hic ad hunc diem veni tam pzed  
R. ac pdicti J. S. & W. V. qui se separatim  
junxer, &c. quam pzed W. M. p Attozid suum  
pzed & Jur inde impannellat exact, quidam  
eorum veni & quidam eorum non veni pout  
patet in pannello, &c. & super hoc pzed R. H.  
& pzed J. S. & W. V. qui separatim junxer,  
&c. dic quod pzed J. S. modo vic Comd pzed  
ristit quodque idem J. S. est de feodo pzed W.  
& consilio in pzemissis & aliis negociis suis  
& aliis de causis pef breve de distring Jur  
Iure pzedice unacum decem talibus de visu  
pzed eis imponend Corond Dord Regis  
Comd pzedice dirigend super quo quesit  
est a pzedicto W. M. siquid pro se habeat  
vel dic sciat quare breve illud Corond Dord  
Regis Comd pzed distring Jur Iure pzed  
unacum decem talibus de visu pzed eis im  
ponend ratione pzemissorum fieri non debet  
quia dic quod non Ideo pcept est Corond  
Dord Regis pzed quod distring Jur Iure  
pzed p omnes terras, &c. & quod de ixit, &c.  
Ita quod habeat corpora, &c. ad fac Juram  
pzed Et appon ei decem tales, &c.

Sur Hill. 9 H.  
8. 1343.

Challenge because the Plaintiff is one of the Sheriffs of London, and the Writ fac awarded to the other Sheriff.

**Et super hoc p̄dictus Querens dicit quod ipse ac quidam Johannes Blunt miles sunt vic London & pro eo quod ipse est unus vic London p̄t quod processus de Wenire fac h̄ris, &c. ad triand̄ erit p̄dictum p̄fat J. B. tantum obtrigetur, &c. & quesit̄ est a p̄fat defend̄ siquid dicere sciat quare processum illi p̄fat Johanni Blunt altero vic, &c. tantum ea ratione fieri non debet qui dicit quod non. Ideo p̄t̄ est eidem Johanni Blunt altero vic, &c. quod Wenire fac in Octab̄ p̄t̄. Ita quod p̄dictus querens in nullo se intro mittat̄ ris, &c. per quos, &c. & qui nec, &c. ad recogit̄, &c. qui tam, &c.**

Challenge to the Deputy Sheriff, because he Impannell'd and returned the Jury at the instance and denomination of the Plaintiff.

**Et super hoc p̄t̄ Defendens Calumpniat̄ Arratamentum pannelli Jurate p̄t̄ eo quod pannellum illud factum & arratat̄ fuit p̄ T. W. sub vic Cord p̄t̄ ad denominationem p̄t̄ quer̄ & in favorem & promotionem ejusdem quer̄ quequidem Calumpnia per Triatores ad hoc elect̄ & Jurat̄ Comperta est vera Ideo, &c.**

Chal-

Challenge by the Kings Serjeant upon an Indictment of Felony, because the Sheriff returned the Jury of Life and Death, at the instance and request and denomination of the Prisoner.

Laurentius B. nuper de A. in Comd p̄s̄b̄ gen̄ capt̄, &c. Recitando totum indictamentum usque Ideo fiat inde Iura, &c. super quo A. B. serviens Dom̄ Regis ad legem pro eodem Domino Rege Calumpn̄ Arraiament̄ pannelli Iurat̄ p̄d̄ quia dīc̄ quod pannellum illud fact̄ & arraiat̄ fuit p̄ Henricum Fortescue vic̄ Com̄ p̄s̄b̄ ad denominationem p̄s̄at̄ Laurentij & in favorem & promotionem ejusdem Laurentij quequidem Calumpn̄ p̄ Trias̄ lozes inde Iur̄ comper̄t̄ est vera Ideo pannellum amoveatur & cassetur, &c. & Venire fac̄ awarded to the Coroner.

Challenge by the Kings Serjeant for the King to some of the Jury for Default of Freehold, to the value of 40 s. per Annum.

Super quo facta publica proclamatione pro Domino Rege, &c. ac quidam J. G. miles serviens dīc̄ Dom̄ Regis ad legem nunc pro eodem Domino Rege ven̄ & quidam Iur̄ modo comparend̄ videt̄ J. L. in Iuram̄ p̄s̄b̄ Iurat̄ existit Et quia res̄d̄ Iur̄ ejusdem Iure modo Comparend̄ non habent terras seu tenementa in Comd p̄s̄b̄ ad annum valorē xl s. a pannello illo penitus extrahuntur, &c.

Mich:

Entry of a  
Challenge af-  
ter Issue joyn-  
ed where the  
Sheriff is  
amoved, &c.

Between Bark-  
ley and Jeffer-  
son.

Mich. 23 and 24 Eliz. Rot. 109. There-  
fore came thereupon the Jury before our Lord  
the King at Westminster, the day, &c. and  
who neither, &c. to Recognize, &c. because  
as well, &c. the same day is given to the said  
Parties there, &c. at which day before the  
said King at Westminster, came the said Par-  
ties by their said Attornies, and the Sheriff  
sent not the Writ; and upon this, the same  
Plaintiff saith, That after the last continu-  
ance of the said Plea, that is to say, after  
the Saturday next after, &c. now last past;  
from which day the said Plaintiff was contin-  
ued here until this day, that is to say, the  
day, &c. R. P. Esq; late Sheriff of the said  
County of E. from the same Office of Sher-  
riff of that County was duly amoved, and  
the said King now by his Letters Patents  
hath committed unto one T. P. Knight, the  
Custody of the said County of E. by pretence  
of which said Letters Patents, the said T.P.  
now remaineth Sheriff of that County, which  
said T. P. of A. at A. aforesaid, took to his  
Wife Anne of the Blood of M. now the Wife  
of him the Plaintiff; that is to say, the  
Daughter of R. D. the Son of W. D. Knight,  
Father of Anne, Mother of the said M. now  
Wife of him the Plaintiff; which said T. P.  
Knight, and A. had Issue between them A. P.  
yet alive, and in full life remaining, at A.  
aforesaid, and this he is ready to prove, &c.  
And for that cause he prayeth a Writ of  
our Lady the now Queen, of Venire fac to  
try the said Issue in form aforesaid joyn-  
ed, to be directed to the Coroners of the said  
County; and because the said Defendant

doth

doth gain-say, and doth not grant that to be true, therefore notwithstanding the same Challenge, a Command is to the Sheriff, that he make to come Twelve, &c. of the Wilsne of B. by whom, &c.

Challenge  
gain-said.

Easter Term, 38 H. 8. Rot. 558. And here upon the Defendant doth Challenge the Array of the Pannel of the said Jury, because he saith, That that Pannel was made and arrayed by A. and C. Coroners of the said County, at the Denomination and in favour of the Pannel of the said Plaintiff, and this he is ready to verifie, and requesteth that the same Pannel may be quashed. And the said Plaintiff saith, That the said Pannel by the said Coroners, was well and equally made; and not at the denomination, nor in favour, nor in promotion of the said Plaintiff; whereupon the said Justices by the consent of the said Parties, did chuse and assign D. and E. two of the said Jury now appearing, to try the said Challenge; which said Tryors being elected and tryed, say upon their Oaths, That the said Pannel was well and faithfully made and arrayed by the said Coroners, and not at the denomination, neither in favour, nor in promotion of the said Plaintiff; whereupon the Jurors of the said Jury being called, tryed and sworn, say, &c.

Challenge to  
the Array, be-  
cause the Co-  
roners made  
the Pannel at  
the Denomi-  
nation of the  
Plaintiff.

#### A Precedent of Challenge to the Array.

May it please you, My Baron, This En-  
quest you ought not to take, for that Sir John  
Ramsden, Knight, Sheriff of the County of  
Aa York,

York, who did return the Pannel betwixt the said A. Plaintiff, and B. Defendant, is Cousin to the Plaintiff, &c. and shew how of Bin, &c. and so where the Challenge is for lack of Hundredors, or other principal Challenge, put it down, &c. and this he is ready to aver, wherof he prays Judgment, and that the said Pannel be quashed.

Or thus, And now at this day S. &c. comes the aforesaid J. S. Plaintiff, and J. B. Defendant by their Attornies, and the Jurors also Impannelled and demanded did come, and thereupon the said J. B. doth Challenge the Array of the Pannel aforesaid, because &c.

This must be put in Writing, but under Counsels Hand, where the Challenge is to the Juries, it is a short way by a Verbal Challenge; for the Learning of this is excellent and copious in our Book.

A Precedent of a Plea after the last Continuance.

And now at this day, &c. comes such a one Defendant, by J. C. his Counsel, and saith, This Action the Plaintiff against the Defendant ought not to maintain; for that after the Quindene of the Holy Trinity last past, from which day until such a day in Michaelmas-Term next, unless the Justices of Assises come before such a day, &c. the Action aforesaid is continued, &c. the Plaintiff by his Writ dated, &c. did Release, &c. and shew, &c. the Matter what it is, whether it abates

abatement in War dilatory, or peremptory, as the Case is, &c. and this he is ready to aver.

Note, Brook in his Abridgment, Tit. Continuance. 61 and 83. says, That after the Inquest is awarded to inquire of Damages, The Defendant cannot plead a Plea Puis le darrein Continuance, because he hath no day in Court to plead.

The day of Nisi prius and day in Bank are all one; so that a Release made betwixt these days cannot be pleaded in Bank; but it seems that a Release made between the day of the Venire facias returned, and the Writ of Nisi prius awarded, and the day of the Nisi prius may be pleaded at the day of the Nisi prius, but not after the Verdict, 21 H. 6. f. 10. Bro. Tit. Jour, &c. 31 Tit. Continuance, 76. 42, 27, 13.

A Man shall have but one Plea after the last Continuance; for the Plaintiff shall not be delayed ad infinitum, 16 H. 7. 11. Bro. Tit. Continuance, 59. 41. 45, 46. 5. 21.

After the Inquest taken by default, and before Judgment, the Defendant came and pleaded an Arbitrement made after the last Continuance; and by the Opinion of the Court, he had no day in Court to plead this Plea, and it was said, That he could Plead no Plea in such Case, but as Amicus Curie, and of matter apparent he shall be received; otherwise, he must resort to his Audita Querela. 21 H. 7. 33. Broke Ibid. 38.

But if the Jury remain for default of Jurors, the Defendant may plead a Release, &c. at the day in Bank Puis le darrein continuance, although he did not offer it at the Nisi prius, otherwise if the Jury had been taken at the Nisi prius. 22 H. 6. 1. Broke ib. 30.

If it be pleaded at the Nisi prius, the Court Record the Plea, and discharge the Inquest, and give day to the Parties in Bank. Ibid. 34. 8.

In Debt after Issue joyned, the Defendant at the Nisi prius pleaded payment of part after the latter continuance in abatement. And the Jury being discharged, and the Plea adjourned in Bank; for that no place of payment was pleaded, the Plaintiff had Judgment to recover his Debt, because after Issue joyned, no Responses ouster can be awarded. L. 5. E. 4. 139. Aley's Reports 66. in the Case of Beaton and Forrest.

Now, although when difficulty arises in the Evidence, the matter is most commonly (of late) found specially, and Demurrers on the Evidence are seldom used; yet in as much as it is sometimes done, and that our Practicer may be prepared with an Authentick Precedent for that purpose, I shall transcribe one out of Cokes Entries, f. 134. viz.

ff.  
Postea.

Postea die & loco Infra Content Coram Jacobo Dyer Milite Capitali Justiciari Domini Regine de Banco & Nicholao Barham uno servient dicti Domini Regine ad Legem Justicie ipsius Domine Regine ad assisas in Com N. Capiend assign p formam Statuti, &c. Item infra nominat J. A. qua infra script H. C. p  
at

atturnat suos infra content & Jur' Jure unde  
infra sit mentio Exact similiter vener' Qui ad  
veritatem de infra content dicend, electi, tri-  
ati, & Jurati fuer' Super quo \* pred H. per  
quendam J. B. de Consilio ipsius H. C. ma-  
nutentione exitus interius junct Cozam  
prefat Just Jur' pred in Evidentijs ostens &  
dic quod, &c. [Here recite the Evidence truly]  
unde petit Judicium & quod Jur' pred vere  
dict suum de & sup infra content pro ipso H.  
reddant, &c.

\* E. D. De  
consilio pred.  
J. A. produx-  
it quosdam  
J. D. & T. E.  
ex parte Quer.  
ad probandum  
Exit. pred. qui  
quidem J. D.  
jurat. existen.

dedit in Evident. Jur. pred. & juravit in his Anglicanis verbis, videl-  
licet, *That upon discourse, &c. [and so recite his Evidence.]* Et pred.  
T. E. jurat. existen. dedit in Evident. Jur. pred. & juravit in his  
Anglicanis verbis, videlicet, *That, &c. [And so recite his Evidence,]* Et  
supra inde H. P. ex consilio Def. dixit quod materia pred. superius  
in eadem dar. non fuit sufficiens in lege ad manutend. exit. pred.  
Et moratur in Lege super Evidenc. pred. Et hoc, &c. Et pet. &c.  
Ex pred. causis ex parte pred. Quer. dixit quod fuit sufficiens in Lege  
Et hoc, &c. Et pet. &c. super quo Jur. pred. super sacrm' suum dic.  
si lex sit cum Quer. quod pred. Def. est Cul. de infra content. modo  
& forma prout pred. quer. interius narravit quodq; pred. quer. occasi-  
one premis. sufficient. dampn. ad 11 l. ultra mil. & custag. Et pro  
mis. & custag. illis ad 40 s. Et si Lex sit cum Def. Jur. pred. dic.  
quod pred. Def. non est cul. modo & forma prout pred. quer. interius  
versus eum queritur.

Et pred J. A. p quenda C. J. de Consilio  
suo dic qd materia pred p pfat H. C. Jur' p  
superius in Evidentijs ostens minus suff' in  
lege existit ad proband exitum interius Junct  
pro parte ejusdem H. quodq; ipse ad materiam  
illam in forma p in Evident ostens necesse  
non habet nec per legem terr' tenet respon-  
dere, & hoc paratus est verificare, unde pro  
defectu sufficient mater Jur' pred in hac parte  
ostent. idem J. petit Judic' & quod Jur' de  
Meredit suo super Exit pred reddend exone-

rentur & debitum suum infra spec una cum dampn suis occasione decet debiti illius sibi adjudicari, &c.

Joynder.

Et p<sup>o</sup> H. C. Ex quo ipse suffic mater in lege ad manutenend<sup>o</sup> erit infra content<sup>o</sup> pro parte ipsius H. Jur p<sup>o</sup> superius in Evident<sup>o</sup> ostens. q<sup>o</sup> ipse pat est verificare, quod quidem materia p<sup>o</sup> J. non dedicit nec ad eam aliquialiter respond<sup>o</sup> sed verificationem illam admittere omnino recusat pet<sup>o</sup> Judic<sup>o</sup>, & quod predict<sup>o</sup> J. ab actione sua p<sup>o</sup> versus eum habend<sup>o</sup> precludatur, ac quod Jur p<sup>o</sup> de Weredict suo super erit p<sup>o</sup> reddend<sup>o</sup> exonerentur, &c.

A Precedent of a Demurrer upon the Evidence.

And now at this day the said Plaintiff and Defendant by their Attornies did appear, and the Jury likewise did appear and were sworn, &c. upon which Sir T. W. Serjeant at Law, of Counsel with the Plaintiff, gave in Evidence so and so, and repeat it truly, and did require the Jurozs to find for the Plaintiff, upon which J. C. of Counsel with the Defendant saith, That the Evidence and Allegations aforesaid alledged, were not sufficient in Law to maintain the Issue joyned for the Plaintiff, to which the Defendant n<sup>o</sup>deth not, nor by the Laws of the Land is not holden to give any Answer, wherefore for default of sufficient Evidence in this behalf, the Defendant demands Judgment, that the Jurozs aforesaid of giving their

Verdict be discharged, &c. and that the Plaintiff be barr'd from having a Verdict, &c. Then the Plaintiff joyns and says, That he hath given sufficient matter in Evidence, to which the Defendant hath given no Answer, &c. and demands Judgment, and that the Jury be discharged, and that the Defendant be Convicted; then the Jury may give Damages, if Judgment shall happen to be for the Plaintiff, &c.

A Bill of Exception.

Memorandum, That the 1st day of August, Anno 1650. before T. P. and W. Justices of our said Lord the King, for taking Assizes in the said County assigned, in a Plea of Trespas and Ejectment, which J. S. in the Court of our said Lord the King before himself, by Bill doth prosecute against E. B. supposing by the said Bill, that the aforesaid T. B. &c. [And recite the substance of the Declaration, or what it is, &c. and the Issue, and then what the Evidence to prove the Defendant guilty was, &c.] Which here was a Surrender of a Copyhold out of Court, &c. and that he desired the Jury aforesaid to give their Verdict for the said T. B. of and upon the Premises, and that he likewise desired the Judges aforesaid, that they would inform the Jury aforesaid, that the Surrender aforesaid out of Court made, was good and effectual in Law, and the aforesaid Justices, the aforesaid Surrender of the Land aforesaid, with the Appurtenances made out of

Aa 4

Court,

clayms Rep.

Court, of the Manor aforesaid, in form aforesaid, did affirm to the said Jurors was not good in Law, by which the said Thomas for that the aforesaid matters to the said Jurors in Evidence shewed, doth not appear, &c. did request of the said Justices, according to the form of the Statute in such Case provided this present Will, which doth contain in it the matter aforesaid, above by him to the Jurors aforesaid shewed, by which the said Justices, at the request of the said Thomas, this Will have sealed at N. aforesaid.

Vide A Bill of Exceptions in the Kings Bench, upon a Tryal at the Assises in Sam. Vernon's Case, in Brownshaws Entries Latine Rediviv. f. 129. Where the Declaration, Plea, Issue and Continuances are set forth, and then the Exceptions. A very useful Precedent.

De Termino Sancti Hillaris, Anno Regni Domini Car. secundi, nunc Regis Anglie, &c. 33 and 34.

Willa ff. Samuel Verdon gen<sup>d</sup> und Cler<sup>g</sup> &c. [Here recite all the Pleadings and Continuances of the Record.] Quiquidem separatim exiit in forma p<sup>re</sup>dicta in partes p<sup>ro</sup> respectiva junct postea scilicet ad Assisas tenet apud Castrum Cant<sup>ie</sup> in Com<sup>itatu</sup> p<sup>ro</sup> coram W. Mountague Capitali Barone Scaccarii dicti Dom<sup>ini</sup> Regis & H. Windham, Mil<sup>ite</sup> und Justic<sup>em</sup> dicti Dom<sup>ini</sup> Regis de Banco Justic<sup>em</sup> Dom<sup>ini</sup> Regis ad Assisas p<sup>ro</sup> p<sup>ro</sup> Com<sup>itatu</sup> capiend<sup>um</sup> assign<sup>um</sup> secundum formam Statut<sup>i</sup>, &c. die Martis 14 die Martis Anno Regni die Dom<sup>ini</sup> Regis nunc 34 ad triac<sup>um</sup> debent Ad quem diem coram Justic<sup>em</sup> p<sup>ro</sup> venit tam p<sup>re</sup>dicta Sam. Verdon in propria pers<sup>ona</sup>

persona sua quam p̄s I. F. per Attor̄m suum  
p̄s & Jur̄ Jurat̄ illi Impannellat̄ exact̄  
similiter ven̄ & in Jur̄ illi separāt̄ erit p̄s  
in forma p̄s respectib̄ junct̄ jurat̄ fuer.

Et sup̄ ciatione illi in forma p̄s habet in  
manutentione p̄s erit superius ult̄ junct̄ p̄s  
S. V. dedit in evident̄ Jur̄ sic impannellat̄ &  
Jurat̄ Quod, &c. [Here recite what he gave in  
Evidence,] Ac sup̄ inde Consiliarij ex parte  
p̄s I. F. interpoluer̄ & insistebant quod ma-  
teria p̄s Jur̄ p̄s in Evidenc̄ sic ut p̄fertur  
dat̄ non fuit sufficiens in Lege ad manute-  
nend̄ erit p̄s ex parte p̄s S. V. Et ea-  
de causa petier̄ & p̄fat̄ Judice quod mater  
illa foret sepealiter compt̄. Nihilominus Justic̄  
p̄s declaraver̄ opinionem suam quod mater̄ p̄s  
Jur̄ p̄s sic ut p̄fertur in Evidenc̄ dat̄ fuit  
sufficiens in Lege ad manutenend̄ erit p̄s ex  
parte p̄s S. V. si Jur̄ illi crederent & inve-  
nirent quod, &c. Ac super inde p̄fat̄ Justic̄  
per directiones suas secund̄ opinionem suam p̄s  
posuer̄ considerationem inde Jur̄ p̄s sup̄ quo  
consiliarij p̄fat̄ I. F. conceper̄ quod per legem  
terre materie p̄s ex parte p̄fat̄ S. V. Jur̄ p̄s in  
evidenc̄ sic ut p̄fertur dat̄ (licet Jur̄ illi  
crederent & invenirent q̄d, &c.) non fuer̄  
in lege sufficiens ad manutenend̄ erit illi p̄s  
S. V. Ideo posuer̄ exceptionem suam opinionem  
Justic̄ p̄s & petier̄ q̄d p̄fat̄ Justic̄ oppone-  
rent mand̄ & sigill̄ sua huic bille secund̄ formam  
statuti in hujusmodi casu edit̄ & provis̄ ac  
superinde p̄fat̄ H. Windham apposuit manus  
& sigilla sua adinde secundum formam Statu-  
ti p̄s dat̄ apud Castrum Cant̄ 14 die Marcij  
Anno Regni dict̄ Dom̄ Regis nunc 34.  
H. Windham.

1. Westm. 2. 31. 13 E. 1. When the Justices will not allow a Bill of Exception upon prayer, if the Party impleaded tender the same unto them in writing, and requires their Seals thereunto, they or one of them shall do it.

2. If the Exception sealed be not put in to the Roll, upon Complaint thereof to the King, the Justice shall be sent for, and if he cannot deny the Seal, the Court shall proceed to Judgment according to the Exception.

This Bill of Exception is given by the Statute of Westm. 2. Cap. 31. before which Statute a Man might have had a Writ of Error; for Error in Law, either, in redditione Judicii, in redditione Executionis or in Processu, &c. which Error in Law must be apparent in the Record, or for Error in fact, by alledging matter out of the Record, as the death of either Party, &c. before Judgment. But the mischief was if either Party did offer any Exception, praying the Justices to allow it, and the Justices overruling it, so as it was never entered of Record, this the Party could not assign for Error, because it neither appeared within the Record, nor was any Error in fact, but in Law, and so the Party grieved was without remedy until this Statute was,

This Act extendeth to all Courts, to all Actions, and to both Parties, and to those who come in their Places, as to the Chancellor, &c. who comes in loco tenentis.

It extendeth not only to all Pleas Dilatory and Peremptory, &c. to Wrayes to be received, Oier of any Record or Dæd, and the like; but also to all Challenges of Jurors and any material Evidence given to any Jury, which by the Court is Over-ruled. 2. Inst. f. 427.

All the Justices ought to Seal the Bill of Exceptions, yet if one doth it, it is sufficient; if all refuse, it is a contempt in them all. And the Party grieved may have a Writ grounded upon this Statute, commanding them to put their Seals Juxta formam Statuti & hoc sub periculo quod incumbit nullatenus omittatis.

The Party must pray the Justices to put their Seals; but if they deny it they may be commanded, and may do it after Judgment.

If the Party grieved be dead, his Heirs or Executors, &c. according to the Case, may have a Writ of Error upon this Bill of Exceptions. And no diminution can be alledged, for the Parties are confined to the matter in the Bill.

If the Justice dye before he acknowledgeth his Seal according to the Act, a Scire Facias shall go to his Executor or Administrator, for the death of the Judge is the Act of God, which shall not prejudice the Party: as in the Case of a Certificate of the Marshal of the King's Host, that the Person outlawed was in the King's Service beyond Sea, in a Writ of Error a Scire Facias shall go to the Marshals Executor or Administrator upon shewing the Certificate.

If

If the Judge denyeth his Seal, the Party may prove it by Witnesses, ib.

Error of a Judgment at the Grand Sessions in the County of Pembroke, in an Assise of darrein Presentment, by Henry Cort against the Bishop of St. Davids, Dorothy Owen and others, for the Church of Stackpool.

The fourth Error assigned was, because the Issue being, whether H. Cort did last present one R. D. the last Incumbent, who was Instituted and Inducted upon his Presentation: The Plaintiff offered in Evidence Letters of Institution, which appeared to be, and so mentions that they were sealed with the Seal of the Bishop of London, because the Bishop of St. Davids had not his Seal of Office there, and those Letters were made out of the Diocess; and the Defendant had demurred thereupon, That those Letters were insufficient, and the Demurrer was denied, which Jones said was an Error, because they ought to have permitted the Demurrer, and should have adjudged upon it. But it was held, that the not admitting of the Demurrer ought not to be assigned for Error; for when upon the Evidence the matter was over-ruled by the Justices of Assise, that was a proper cause of a Bill of Exceptions, and the remedy which the Statute appoints in that Case; And for the matter of the Letters of Institution sealed with another Seal, and made out of the Diocess, it was held they were good enough, for the Seal is not material, it being an Act made of the Institution, and the Writing and Sealing is

but a Testimonial thereof, which may be under any Seal, or in any place. But of that point they would advise. Cro. 1 part, 40.

The Party grieved may have a Writ of Error, and may assign Error upon that Will sealed, and also in the Record, or in one of them at his pleasure. F. N. B. f. 21. N. ex rigore juris, it need not be allowed in Arrest of Judgment. 27 H. 8. in Tatum's Motion upon the Case.

Note, This Bill is to prevent the precipitancy of the Judges, and ought to be allowed in all Courts, and in all places of Pleadings, and may be put in at any time before the Jury have given their Verdict.

But this Bill is rarely used, there being impar congressus, betwixt the Judge and the Counsel; and the prudence of the Judges induce them to find special Verdicts in Cases of doubt and difficulty.

A Release pleaded at the Assises after Issue joined.

Et p̄ Defend in propria persona sua vendic quod p̄ Justic Dorn Regis hic ad captionem Jur̄ p̄ inter ipsum Defend & prefat Quer̄ procedere non debent quia dic̄ quod post xij diem F. ult̄ preterit̄ de quo die Jur̄ p̄ inter partes p̄ continuat̄ fuit, & ante hunc diem [scilicet diem de Assise] scilicet primo die M. Anno, &c. apud, &c. p̄. quer̄ per nomen, &c. remisit, relaxavit, &c. Et hoc, &c. unde

unde per quod Justic' p' ad captionem J' p' ulterius procedere nolunt.

The Death of one of the Defendants pleaded after the last Continuance.

Et p' Defend' per A. B. Attorn' ser-  
vend' & p' T. non vend' & sup' hoc p' Defend'  
dic' quod post ult' continuationem placiti p'  
scilicet post xv. Pasche ult' p'eterit de quo de  
loquela p'ed' ult' continuat' fuit hic usque ad  
diem scilicet in Crō scō Trin' tunc p'or' lo-  
quend' & ante eundem diem scilicet decimo de  
Maii ult' p'eterit p'ed' T. apud A. p' obit.  
Et per quod null' p'ocess' nec aliquid aliud in  
placito p' ulterius s'us p'efat' T. fiat & quod  
p' I. & K. hoc non debeat Ideo null' p'ocess'  
nec aliquid aliud in placito p' s'us p'efat' T.  
fiat, &c.

A Baron Challenges the Pannel because no  
Knight was returned of the same.

Et sup' hoc idem T. calumpniat arraiement  
pannelli p' quia dic' quod ipse est & tempore  
arraiment' pannelli illius fuit Baro hujus  
Regni Anglie locum & vocem habens in  
quo Parlamento hujus Reg' quodque in eod'  
pannello nullus Miles nominat' & retor'  
erit Et hoc paratus est verificare unde p'  
cit' Iudicium & quod pannellum illud casto-  
tur, &c.

Evidence, and Demurrer upon Evidence, *Mis-  
leton against Waker.* Cro. Eliz. 42.  
f. 751.

In Ejectment, It was held by all the  
Court upon Evidence to a Jury, That if the  
Plaintiff give in Evidence any matter in  
Writing or Record, or a Sentence in the  
Spiritual Court, (as it was in this Case)  
and the Defendant offers to demur thereupon,  
the Plaintiff ought to join in the Demurrer,  
or waive the Evidence, because the Defen-  
dant shall not be compelled to put matter  
of difficulty to lay Gens, and because there  
cannot be any variance of a matter in Writ-  
ing. But if either Party offer to demur up-  
on any Evidence given by Witness, the  
other, unless he pleaseth, shall not be com-  
pelled to join, because the credit of the tes-  
timony is to be examined by a Jury, and the  
Evidence is uncertain, and may be enforced  
more or less; but both Parties may agree to  
join in Demurrer upon such Evidence. And  
in the *Queens Case*, the other Party may  
not demur upon Evidence given in Writing  
or Record, for the Queen, unless the Queens  
Council will thereto assent; but the Court  
in such case shall charge the Jury to find the  
matter specially, as appears 34 H. 8. Dyer  
53. But this is by Privilege. Vide Lib. 4.  
104. the same Case, and 1 Inst. 72. Where  
my Lord Cook says, If the Plaintiff in Eject-  
ment give any matter of Record, or Writings,  
or any Sentence in the Eccle-  
siastical

Joynder in  
Demurrer.

Magistral Court, or other matter of Evidence by Testimony of Witnesses, or otherwise, whereupon doubt in Law ariseth, and the Defendant offer to demur in Law thereupon, the Plaintiff cannot refuse to joyn in Demurrer, no more than in a Demurrer upon a Count, Replication, &c. and so converso, may the Plaintiff demur in Law upon the Evidence of the Defendant, but the Kings Counsel shall not be enforced to joyn in Demurrer; but in that case the Court may direct the Jury to find the special matter. So that the several sorts of Evidence make no difference, as to the joyning in Demurrer. 1 Part Leon. 206.

Darrose against Newbott. Cro. 4 Car. f. 143.

In Error of a Judgment in Bridgewater: The Error assigned was, for that, in an Action upon the Case sur Assumpsit, the Parties being at Issue, a Demurrer was joynd upon the Evidence, and thereupon the Jury discharged, and afterwards Judgment was given for the Plaintiff, and a Writ of Inquiry of Damages awarded, and Damages found, and Judgment thereupon; where the Jurors which came to find the Issue, although by the Demurrer they were discharged of the Issue, yet ought to have assessed Damages conditionally, if Judgment should be given for the Plaintiff. And in proof thereof was cited Newis and Scholastica's Case, Pl. Com. f. 408. and the old Book of Entries, &c. And it was said by

by the Court, if these Precedents be good Law, then it may be enquired of by the same Jury conditionally: But it may be as well inquired of by a Writ of Inquiry of Damages, when the Demurrer is determined, and the most usual course is, when there is a Demurrer upon Evidence, to discharge the Jury without more inquiry. But as my Lord Chief Baron Montague held at the Assises in Cambridgeshire, 1682. it may be one way or other.

Note, He that demurs upon Evidence, admits the Evidence to be true.

In the Assise by R. Lewis and Scholastica his Wife, against Lark and Hunt, which was taken by default. The Precedent in Plowd. Com. as to this matter runs thus,

Recognit Assise p̄o exacti venerunt, qui ad veritatem de premissis dicend electi, triati, & jurati fuerunt, sup quo Willielmus Ben-  
lows Serbiens ad legem de consilio pre-  
dictorum R. & Scholastice in manutentione  
Assise p̄o coram Justic Dom Reg de Banc  
hic in evident Recognit Assise p̄o dixit, quod  
diu ante diem impetrationis Assise p̄o quis-  
dam H. Clark fuit seiscitus, &c. Et condi-  
dit testamentum & ultimam voluntatem sua  
in scriptis, inter alia, unde pars inde in hiis  
Anglicis verbis sequitur videl [Also this is  
the last Will and Testament of me the said  
Henry Clark, for and concerning, &c.] Et ul-  
terius idem Serbiens ad legem ex parte p̄o  
R. & S. dedit in evident eisd Recognit quod,  
&c. Quorum preterit idem jam Serbiens  
ad legem erigit quod iidem Recognit Assise  
p̄o Assiam p̄o de tenementis p̄o cum pers-

W b

rud

tin in visu, &c. pro parte ipsorum R. & S. triari & comparere debeant, &c. Et veredictum suum dare debent qđ pđ W. Lark & J. Hunt dictos R. & S. de tenementis pñ cum pñtin in visu, &c. disseisiverant, &c.

Et pđ W. Lark & J. H. in propriis personis suis dic qđ evident & allegation pñ ex parte pđ R. & S. superius allegat minus sufficient in lege existunt ad manuteneñd Assisam pđ ad quos ipse necesse non habent nec p leg terre tenentur respondere unde pro defectu sufficient evident in hac parte pñt iudicium quod juratores pđ de veredicto suo in pñmissis dicend exonerentur, &c. Et quod pđ R. & S. ab Assisa sua pñ habent pñcludantur, &c.

Et pđ R. & S. dicunt quod ex quo ipse sufficientem materiam in manutentione Assise pñ in evident recognit pñ ostend quam quidem materiam pđ W. Lark & J. Hunt non debent nec ad eam aliquallit respond petunt iudicium Et quod iidem Jurator inde exonerentur, & quod pđ W. & J. de Assisa illa convicantur, &c. Sup quo dict est Recogn pñ quod inquit que dampna pñed R. & S. sustinuer tam occasione disseisine pñ quam pñmissis & custagiis suis per ipsos circa sectam suam in hac parte apposit si conting iudicium pro iisdem R. & S. in placito pñed sup evidencias pñed reddi Qui quidem Recogn dicunt sup sacram suum quod si conting iudicium in placito pñ pro pđ R. & S. sup evidencias pñ reddi, iidem R. & S. sustinuer dampna occasione disseisine pñed ad 13 s. 4 d. & pro missis & custagiis suis ad 20 s. Et quia  
Iustis

Iusticiarij hic se advisare volunt de & sup  
hemissis priusquam iudicium inde reddant,  
les datus est partibus predict, &c.

Note, several Exceptions were taken to  
the manner of giving the Evidence; First,  
that the intire Will was not shewed, but  
part, and that this being the foundation of  
the Evidence, the whole Will ought to have  
been shewed; for there might be some other  
matter of substance, as a Condition, Limi-  
tation, &c. in the parts not shewed. But  
all the Iustices disallowed this Exception,  
and said, the Party in any Title or War,  
needs shew no more than what makes for  
him. As in an Act of Parliament, in which  
several divers branches, 'tis sufficient to shew  
that branch which serves ones purpose, and  
not like the Case of a Fine or Recovery of  
twenty Acres, where I must shew the whole  
Record, although I am concerned but in one  
acre, because the Original is intire, and so  
the Record grounded upon it. See also  
Culmerston and Steward's Case, Pl. Com.  
102. Another Exception was, That the  
Fine was not shewed under the Seal of the  
Court, or the great Seal, but one part in-  
vented of the Chirograph was only shewn,  
which the Jurors were not bound to believe,  
because it wanted a Seal. But all the Ju-  
stices were against this, and said, the Jury  
might find the Fine of their own know-  
ledge, without the shewing of the Parties,  
or they might find it upon the credit of any  
Witness that had seen it, and the shewing  
of the part invented, is the usual Evidence of  
a Fine

a Fine. (Note, a Fine indented and not exemplified under Seal, &c. shall not be delivered to the Jury, 34 H. 6. 25.) And they said, because it is only the Inducement of the verity to the Jurors, the Party could not demur upon this; for the effect of the matter is, that there is such a Fine which is amongst the Records. And this is the substance of the matter, and the part of the Chirograph is nothing but the Image of the verity, and therefore there could be no Demurrer upon this.

Another Exception was, That the Record was not shewed under Seal, or at least that the Roll of this ought to be alleged certainly; but all the Court (except Harpe) answered, That upon the general Issue, the Jury might find things that proved or disproved the seisin or disseisin, be they matters of Record or otherwise, and the Jury could not give a rightful Verdict, if they could not find them, and whatsoever they may take consilience of themselves, may be given in Evidence by words, or copies, or other argument of the truth. 'Tis true, in pleading, a Man cannot make a Title by Record, without shewing the same under the Great Seal, and if a Record be pleaded in Bar, a day may be given to bring in the Record under the Great Seal; but such day cannot be given to bring in the Record upon Evidence, but the finding of it by the Jury is sufficient, and they may find it of themselves, although it be not shewed them in Evidence. But perhaps they shall not be bound upon pain of Attaint to find it,

Stiles 22.  
White and  
Pindars Case.

it be not shewed them under Seal ; but nevertheless they may find it, and they do well, if it be true. And by the same reason that they may find it, they may take Instruction of it by any circumstance, which induceth the truth. (Note if it be not necessary to shew the Record, and the Jury may find it without ; yet 'tis not fit to be permitted to prove it in such a manner, without shewing the Record, or a true Copy of it.) And the Demurrer upon Evidence goes to the Law upon the matter, and not to the verity, which is admitted, and the Effect in Law is denyed, for if the Party will not confess the truth of the matter given in Evidence, then he ought so to say, and put it to the Jury to be tryed, and if they find this, where it is false, an Attaint lies ; but Demurrer upon Evidence never denies the truth of the Fact, but confesses the Fact and denies the Law to be with the Party which shews the Fact.

Vide Rolls Tit.  
Tryal 687.

As to a fourth Exception, for want of Alleging and averring that H. Clark, had not any other Issue Male than John and F. (upon Limitation of a Remainder for want of Issue Male of H. C. and a title made to the Plaintiffs Wife, under that Limitation ;) The same Judges answered, that which the Plaintiffs gave in Evidence, is to the intent to perswade the Jury, that they have a good Title, and what they say shall be applied as they intended ; and as by presumption no man will say any thing against himself, so it lies on the other side to shew what is against him ; and although in Pleading, cer-

tainly ought to be shewed, (to which the other Party must answer, and upon which the Court may judge,) yet in Evidence, a great and exact certainty is not requisite, for the Jury may found their Verdict, (if the matter be ambiguous) upon what is most probable, and by the same reason that which is most probable, is good Evidence, and therefore it shall be intended that H. C. had no other Issue Plea, because the other Party did not shew that he had.

The Precedent of a Demurrer upon Evidence in Reniger and Fogassa's Case, in Plow Com. f. 1. In an Information upon a seizure of *Woad Imported*, the Customs not being paid, nor any agreement made with the Collector in the Exchequer, where the Issue was, whether the Defendant made an Agreement with the Collector of the Subsidies for the *Woad*, according to the Act, or not.

*Ideo fiat inde inquis ac pro eo quod idem A. Fogassa est alien natus videlicet apud Civitatem portus Portugalie in Portugalia sub obedientia p[ro] Portugalie Regis, petit modificationem lingue sue, &c. A. B. C. D. E. &c. qui ad veritatem de premissis dicunt electi, triati & jurati dicunt A. F. in mentione erit p[ro] superius ad pat[er] juncti, & ad proband[um] erit ill[ud] p[ro] parte ipsius A. testium producit p[re]s[ent] Tho. Wells Collectorem & Subsidii Domini Regis in portu ville Southampton ac J. S. advocat[um] & advocatum Clericum sive servient[em] ipsius Tho. Wells in dicto Officio Collect[oris] p[ro] nec non quendam J.*

h. Peoman ad testificandū premiffa in placitū  
ipfius A. fpec' fore vera. Qui quidem  
Tho. Wells examinatus fup factū fuum coram  
Baronibus hic preftitum in premiffis,  
fecit, quod, &c. [Here recite the Evidence.]

Et pō Attozū Domini Regis pro eod' Do-  
mino Rege dic' quod evidentiē pō fuperius  
at minus fufficiendū in lege exiftunt ad  
manutenendū feu probandū erit pzed pro parte  
ipfius A. f. fuperius ad patriam junctū unde  
b' infufficient' earundem evidenti' ac ex quo  
evidentias illas non dedicitur forisfactura  
bonorum pō in informacione pō fpec' idem  
Attozū Domini Regis pro ipfo Domino  
Rege petit Judicium ac quod eadem bona  
remaneant Domino Regi forisfacta juxta for-  
mam ftatuti pō. Et pō A. f. dic' quod ebi-  
dentiē pzed fuperius ex parte ipfius A. f.  
at fufficiendū in lege exiftunt tam ad manu-  
tenendū & probandū erit pzed pro parte dicti  
A. f. fuperius ad patriam junctū quam ad  
excludendū Dominū Regem de aliqua foris-  
factura bonor' pzed habendū. Ad quas pzed  
Attozū Domini Regis pro ipfo Domino  
Rege minus fufficienter refpondit nec ali-  
quod pro ipfo Rege allegabit, unde idem A.  
petit Judicium ac quod pzed bona in dicta in-  
formacione fpec' ei reliberentur quodque ipfe  
quoad premiffa ab hac Curia dimittatur. Ideo  
ad Judicium.

Note, In this Cafe, the Agreement ac-  
cording to the Statute, was put in Iflue ge-  
nerally, and yet the fpecial Agreement main-  
tained the Iflue.

*Regula.*

And wheresoever the Evidence doth not warrant, prove and maintain the very same thing that is in Issue, that Evidence is defective, and may be demurred upon.

*Non est factum.*

Upon Non est factum to a Bond dated at York: It was said in this Case, that to prove the Bond made in another place, doth not prove the Bond nor warrant the Issue, because the delivery is intended to be where the Date is; but the Witnesses cannot prove the contrary, and so the Issue is not proven. But surely if this be found, the Plaintiff shall have Judgment as well as upon a Bond delivered before the date. 31 H. 6. Plo. 7. Rolls 677. But infancy or made by Dures, cannot be given in Evidence upon non est factum, Lib. 5. Whelpdale's Case, 119. because thereby the Bond is not void but only voidable: otherwise of the Bond of a Feme Covert, or Monk, for there the Bond is void, and so Non est factum; and so of a Bond made to a Feme Covert, and the Husband disagree to it, or by Husband and Feme, Non est factum of the Wife.

*Release.*

In An Assise if the Tenant plead, Nul tort, Nul disseisin, he cannot give in Evidence a Release after the Disseisin; but a Release before the Disseisin he may, for then there is no Disseisin upon the matter.

*Warranty.*

In a Writ of Right, if the Tenant join the Plea upon the meer Right, he cannot give in Evidence a Collateral Warranty, for he hath not any right by it, and therefore it ought to have been pleaded. 1 Inst. 283.

Re-

Regularly, whatsoever is done by force of a Regula.  
Warrant or Authority, ought to be pleaded.

But Note, In all Cases where one cannot have advantage of the special matter, by way of Plea, there he may have advantage of it in Evidence; as for Example, the Rule of Law is, That one cannot justify the Death or killing of a Man; and therefore if one kill another in his own defence, he cannot plead this specially; but he may give this in Evidence: and so in defence of his House against Thieves and Robbers, &c.

By the Statute 23 H. 8. Cap. 5. any Sewers.  
thing done by the Authority of the Commission of Sewers, may be given in Evidence upon the general Issue.

After taking the General Issue, the Defendant cannot give in Evidence any thing that goes in discharge of the Action; as in Debt upon Nil Debet, he cannot give in Evidence a Release, nor a Grant to cut Trees, to repair upon nul waste fait, nor making of a Ditch to amend the Meadow; but that he only lopped the Trees, he may, if waste be assigned in succidendo Arbores, &c. Neither if a Statute was made that all Tenants for Life should be punishable of waste, could he give in Evidence this Statute, 28 H. 8. Dyer 28. for the Discharge ought to be pleaded, because it admits a cause of Action without it.

In Debt against Executors, and Assigns Inter manus, in Issue, 'tis good Evidence that they sold Land, by the Will of the Testator, &c. and that they had the Money paid, so that they recovered Damages in Trespass for

for Goods taken in the Life of the Testator, &c. 3 H. 6. 3.

Villenage.

In an Issue upon Villenage regardant to a Manor, a Villain in gross is no Evidence. Dyer 48.

Attornment.

In writ by the Grant of a Reversion, by Montague and Fitz. the Lessee may plead that he in Reversion ne granta pas per le fait, and give in Evidence, that he never attorned, or he may Traverse the Attornment at his election, Dyer 31.

Trespas.

In Trespas, Quare clausum fregit, the Defendant says, that locus in quo, &c. is 6 Acres in D. which is his Fræhold: the Plaintiff replies, that it is his Fræhold and not the Defendants; the Defendant cannot give in Evidence, other 6 Acres in D. which are his Fræhold, because the Plea shall be intended to refer to the 6 Acres of the Plaintiffs, Dyer 23.

Rescous.

In Rescous by the Lord, upon Not Guilty, the Defendant shall not give in Evidence, That he doth not hold; by Vavasour and Bryan: and so if he said nothing is behind in Abowry, he shall not give in Evidence that he doth not hold of him. T. 9 H. 7. 3.

Avowry.

Feoffment.

In Assise, Feoffment pleaded, the Plaintiff said, he did not enfeoff modo & forma upon the Wæd and Letter of Attorny to Infeoff upon condition found, if the Attorny made it without condition, this well proves the Issue for the Plaintiff. 13 E. 4. 4.

If one plead a Feoffment Joynment with his Companion, or of a Feme Covert, the other may say ne enfeoffa pas, and give the matter in Evidence, and the Court shall instruct the Jury of the Law. 18 E. 4. 29.

Upon

Upon the general Issue, any thing may be given in Evidence, which proves the Plaintiff had no cause of Action. Regula.

Trespas by the Warden of the Fleet, upon Not Guilty, you may give in Evidence, that he is not Warden, 4 E. 4. 7. Trespas.

So in Trespas of a House, that he had no House there, or the Freehold of another, and not of the Plaintiff, is good Evidence upon Not Guilty: but in Trespas of Goods, 'tis no good Plea to say, the property was in another, although it is in a Replevin; and therefore it seems to be no good Evidence in Trespas, because possession maintains the Action against all but the Owner; but that the property was in a Stranger, and he gave them to the Defendant, is good. See before Cap. Evidence, 27 H. 8. 25. But in Trover that they were not the Goods of the Plaintiff is good Evidence. 5 H. 7. 3. Trover.

Cessavit and Count, that of divers Lands held by entire Service, upon non tenuit modo & forma, held by several services, is good Evidence, for he had no such cause of Action, 10 H. 7. 24. Cessavit.

Upon the general Issue, for the Defendant by Evidence to convey to himself the same Interest and Title, is good Evidence. Regula.

As in Trespas of Goshawks, Not Guilty, and Evidence, that he had a Lease of that Wood for years where they were taken, is good, for it is his Title. Trespas.

Account of Receipt, by the hands of J. S. the Defendant pleads ne unques son Receiver, and Evidence that J. S. gave this to him, is good Account.

good, 2 H. 4. 13. So in Trespas a Lease for years, Tenancy at sufferance (but not at Will,) that they were a Strangers Goods, who gave them to the Defendant, is good Evidence, upon Not Guilty. 22 Aff. 73. because by these matters he makes himself a Title, & sic de cæteris.

## Regula.

Upon the general Issue, if by the Evidence the Defendant acknowledge that he did the wrong, and justify this, and gives matter that goes to discharge him of the Act by justification, this Evidence is not good, but he ought to have pleaded it.

This Rule is demonstrated by those Cases where upon Not Guilty, in Trespas, the Defendant would say the Property was in a Stranger, and that by his commandment, or his Servant, he took the Goods. Not Guilty, and that he did the Battery se defendendo. Not Guilty in maintenance, and lawful maintenance. Insufficiency of Wounds. The Fræhold of a Stranger, and his Licence. A former Recovery in another Action. So for Common, Rent-service, Rent-charge, Licence, &c. cannot be given in Evidence upon the general Issue; for these matters in Evidence are Justifications, which go in discharge of the Party, but not by Title, but by justification.

So where an Impzisonment or Entry is given by authority of Law, or by authority from any Party, as for an Impzisonment, by the Statute of Trespaslers in Parks, putting a Man off his Ground, thrusting a Man out of Church that troubles the Congregation in Service, parting an Aftay, and keep-  
ing

ing the quarrellers apart, in defence of himself or his. Entry in perambulation. Entry to amend his Gutter leading to his House, as of ancient time had been used. That it was a Common Inn. That he put in his Cattel by the Plaintiffs agreement. That he entred and took the Emblements after the death of the Tenant for Life. That the Plaintiff owed him Pony, and by his inhibition he went into his House to receive it. That he took the Goods as a Harriot, Waif, Estray, or Wreck. Or the Plaintiff took away the Defendants Cattel and he entred into the Close where they were, and took them again. That he took the Cattel damage feasant in his Ground, or for an Amercement in a Lét, &c. That the Goods were the Goods of J. S. who delivered them to the Plaintiff to keep, and J. S. commanded the Defendant to take them; or excuse it, that the Plaintiff delivered them to him. That he took them by a Writ. That as Schoolmaster he gave moderate Correction. These are excuses and justifications without Title, and therefore must be pleaded and cannot be given in Evidence upon Not Guilty.

So in an Action de malefactoribus in parvis, he cannot plead Not Guilty, and give a Licence in Evidence. So in an Appeal, if he plead Not Guilty, and shews that he was Sheriff, and executed his Office, or that he was Forester, and killed him because he fled, and would not submit. Vide 12 H. 8. f. 1. The best Case of this matter.

Evi-

## Regula.

Evidence which is contrary to that in Issue, or which is not agreeable to the matter in Issue, is not good.

As appears by several Cases, which you may find in the Chapter of Evidence. As upon the Issue, nothing passes by the Deed; you cannot give in Evidence, that it is not your Deed, for this is contrary to the Issue, and to that which is acknowledged in the Plea by implication. 5 H. 4. f. 2.

And so upon Not Guilty, in Assault and Battery, and Evidence that it was done in his own defence, is not good.

And so in Debt upon a Bail-Bond, you must plead, That there is not the Name of Sheriff in it, Et issint nient son fait, and cannot give in Evidence upon non est factum, for it is contrariant, 5 E. 4. 5.

So upon Issue of Common appendant, Common pur cause de vicinage, is not agreeable to the matter in Issue, and therefore cannot be given in Evidence, 13 H. 7. 13.

## Regula.

Where the Evidence proves the Effect and substance of the Issue, it is good.

As to prove a Grant or Lease pleaded simplement, a Grant or Lease upon condition, and the condition executed, is good, for this proves the effect and substance of the Issue, 14 H. 8. 20. So a promise to the Wife, and the Husbands Agreement proves a promise to the Husband, and this you may see in many Cases, in the Chapter Evidence.

Other Cases  
of Evidence.

## Trespas.

In Trespas for Goods taken, the Defendant, upon Not Guilty, in mitigation of Damages, may give in Evidence, That

the Plaintiff had his Goods again, 11 H. 4.  
24. 19 H. 6. 34.

Justifiable maintenance cannot be given in Evidence upon the general Issue, but must be pleaded. The Master may justify for his Servant. Any Man for his Kindred, &c. for to give Money to the Poor, &c. But that he was of his Counsel, may be given in Evidence upon the general Issue, for to give Counsel, is not maintenance. 22 H. 6. 35.  
28 H. 8. 6.

Upon this Issue, the Defendant may give in Evidence, that he is a Lay-Man not let-tered, and that it was read to him in another form, 15 E. 4. 18. but it is the best way to plead it, for the understanding of the Jury. 39 H. 6. 9. Bro. Waiver 2.

In an Issue upon a prescription Traver- sed, the Plaintiff gave in Evidence a Deed bearing date after the time of limitation, scil. after the time of R. 1. And the Defen- dant would have demurred in Law upon it, and well he might per Cur. Whereupon the Plaintiff would not give this in Evidence, but gave other Evidence 34 H. 6. 37. See Chapter Evidence, where a Grant shall be taken as a confirmation of a Prescription.

Note, The Opinion, 12 H. 4. 21. That a Deed made before the time of memory, may be given in Evidence, although it cannot be pleaded.

Upon Not Guilty, the Defendant gave in Evidence, That by the Plaintiffs Agré- ment he carried him from D. to S. and held good, because, what is done by the Plaintiffs Agrément, is no Imprisonment. 14 H. 6. 2.

Upon

*Non est factum.*

A witness may prove the contents of a Deed or Will. *Vaugh. and Rep. 77.*

Prescription.

Ancient Deeds.

False Imprisonment.

Upon Not Guilty, the Defendant laid, his Master locked the Plaintiff into a Chamber of his House, and gave the Defendant, being his Servant, the Key to keep. 22 E. 4. 45.

Sow pigged,  
being taken  
in Distress.

Vide Repl. in Fitz. 34. Repl. of a Sow and Piggs, the Defendant justified for the Sow, and to the Piggs, pleaded he did not take them; the Jury found, that the Sow was with Pigg, when she was taken, and after cast her Piggs, in the Custody of the Defendant; and the Plaintiff recovered Damages: for says Bro. Abzrog. Wit. general Issue, 88. This is a special taking in Law.

Dower.

Dower of Kent. Hill. ne unque seisie que Dower la &c. Horton J. S. granted the Kent to the Husband, payable at Michaelmas next, and the Husband dyed before the day, and so he was seized in Law, and demanded Judgment. Thirn. You shall say generally, quod seisie que Dower la &c, and give your Case in Evidence, Et sic bene, notwithstanding the doubt of the lay Gens, for they ought to credit the Law, and Evidence is not to be pleaded. 11 H. 4. 88.

Emblements.  
Knivets Case.  
Lib. 5. 85.

Tenant for Life, Leaseh for years, who is ousted, and the Tenant for Life is disseised: The disseisor leaseh for years, who sows the Land; the Tenant for Life dies; he in remainder in Fee brings Trespals against the Defendants claiming the Emblements by the Lessee of the Disseisor. Adjudged, that they had not the max right, but in respect of their possession, they should bar the Plaintiff, who had no right; and that the max

meer right was in the Lessee of the Tenant for Life, and that he might bring Trespass against the Lessee of the Disseisor, and recover all the mean profits. But as to the Entry into the Land to take the Emblements, this was good matter of justification; but in regard it was not pleaded, it could not be given in Evidence upon Not Guilty; and therefore the Plaintiff had Judgment for the Entry, and was barred for the residue. Note, that the Lessee of Tenant for Life had right to the Land, and by consequence to the Emblements, as things annexed to the Land, and the death of the Tenant for Life determines his Interest to the Land, but his right to the Emblements remains.

It sufficeth to prove the substance, without any precise regard to the Circumstance. As if an Indictment be, That with a Dagger the Offender gave another a mortal Wound, &c. And in Evidence it proved to be done with a Sword, Rapier, Club, Bill, or any other Weapon, the Offender upon this Evidence ought to be found Guilty; for the Mortal Wound is the substance, and the manner of the Weapon is but the circumstance; yet some Weapon ought to be mentioned in the Indictment. And so if A. B. and C. be Indicted for Killing of J. S. and that A. stroke and the other were abettors; to prove that B. stroke is sufficient, &c.

Regula.  
Substance.  
Circumstance.

Manslaughter upon an Indictment must be found, if proved, because the killing is substance, upon which Judgment shall be given.

Indictments for Murder of Ministers of Justice, in execution of their Office, may be general, viz. That the Prisoners felonice, voluntarie & ex malitia sua præcognitata, &c. percusserunt, &c. without alledging the special matter which may be given in Evidence, for the Law implies Malice prepensed. So if a Thief in robbing kills the Man that resists him, or a Man is killed without any provocation, or without malice prepensed that can be actually proved, the Law adjudges this Murder, and implies the Malice; no in these Cases, the Offenders may be Indicted generally, That they killed of Malice prepense, for the Malice implies by Law, given in Evidence, is sufficient to maintain the general Indictment. Lib. 9. 67. Mackalley's Case.

So of an Indictment as accessory to two to prove accessory to one, is sufficient, Lib. 9. 119.

In Cromwel's Case, Lib. 4. 12. Although it was objected that in an Action of Slander, If the Defendant will justify, he must justify the same words and in the same sense, as is laid in the Bar. or else he must plead, Not Guilty, and give the special matter, that is the variance in Evidence. But the Court held, That the Defendant should not be put to the general Issue, but might justify, although he varied from the Plaintiff in the sense and quality of the words: and might set forth the coherent words. As for calling the Plaintiff Murderer, the Defendant may shew that they were speaking of Hares, and the words were spoken in reference to killing of Hares.

Upon

Upon the Issue, if the Lord of the Manor granted the Lands, per copiam rotulorum Curie manerii præd. secundum consuetudinem manerii præd. To prove that there were customary Lands in the Manor; and that the Lord of the Manor granted the Land, &c. Per. Copiam Rotul. Curie, where it was never granted by Cope before, is no good Evidence to find the Custom, or that the Lands, &c. were grantable or demiseable by Custom. Leon. 55. Kemp and Carters Case.

Forger of a Deed, in which is contained a demise of the site of the Manor of R. and terras dominicales, &c. A Deed of the site, and all the Demesnes of the said Manor, exceptis duabus clausuris, &c. is good Evidence, for it is not necessary to construe terras dominicales, &c. omnes terras dominicales, &c. for Lands not accepted are terras dominicales, and so the Court is satisfied by that Evidence, Leon. 139. Atkins and Hales Case.

Debt against an Executor, upon plene administravit, it appeared that the Executor misled and administered, and then refused in Court, and administration was granted to another; and that several Sums were recovered against the Administrator; it was said by Periam Justice, 1. That if an Administrator (who is a Stranger) administer, without the commandment of the Executor, the Executor cannot give such administration in Evidence to prove his Issue. 2. That in the principal Case, the Executor having administered he could not refuse, and so the administration is granted without cause, and what he did was without warrant,

Copyhold.  
In Pilkingtons Case. Stiles 450.  
Rolls said, If Copies of Rourt Roll be shewed to prove a Customary Estate, the enjoyment of such Estates must also be proved, otherwise the Proof is not good.  
Forger.  
Totum & pars.

Plene Administravit.

Upon Plene administravit a Retainer may be given in Evidence.

and no administration, Leon. 134. Hawkins and Lawle Case. At Bury Assises, 1682. before Judge Windham, The Executor gave the administration of the Administrator in Evidence, and allowed; but there, what the Administrator did, was by the Executors consent. In M<sup>r</sup>. Lun and his Mothers Case.

*Plene administravit.*

An Executor pleads *plene administravit* prater a Judgment, Replikation, and Issue, that the Judgment was fraudulent.

The Obligee who had the Judgment, was denied to have

Evidence about his Debt, for he sweareth to have Assets for himself, and is Interested in the thing. Before Judge Windham, at Bedford Assises, 1682.

No Evidence to be given against what is admitted upon the Record.

An Executor de son tort cannot give in Evidence his retaining of Goods to pay himself, for he cannot retain; but if he take out Letters of Administration (although) Pendente lite, he may retain for a Debt of as high a nature, and plead this in Bar, for the administration purges his wrong, and although he shall not abate the Writ by taking out Letters of administration, yet he may plead this in Bar. Stiles Reports, 338.

In a Replevin, the taking was supposed in R. The Defendant said that the place where, is forty Acres, parcel of the Manor of R. which is his Freehold, and avowed for Damage feasant; The Plaintiff said, that the place where, is parcel of the Manor of R. in R. and conveyed title to himself in that; Absque hoc, that the Manor of R. unde, was the Freehold of the Defendant. It was the Opinion of the Justices, that the Plaintiff is estopped to give Evidence that Defendant had not any Manor of R. for the words

words absque hoc and unde imply he had such a Manor, but he ought to have taken it by protestation, that the Defendant had no such Manor of R. in R. absque hoc, that the forty Acres was the Freehold of the Defendant, Dyer 183.

Trespas, concerning the Rectory of Norton Pinckney, which belongs to Oriel College in Oxford. The Issue was, if there was a Vicaridge indowed there, or only a Stipendiary Curate.

1. All agreed, that if a Vicaridge be erected and established, if there was no Endowment de facto of the Vicaridge, the Vicar could not claim any thing.

2. There was shewed an Impropriation by the Licence of the Pope, made in the time of E. 2. Dodridge said, that was not good. Jones, e contra. And it will be perilous to such ancient Impropriations, if now the consent of the King must be shewed; and at that time it was taken good by the assent of the Pope without the King. Dodderidge denyed that the Pope without the King at that time could make an Impropriation with the Ordinary and Patron. But Crew agreed with Jones. And in things of such antiquity omnia præsumuntur solemniter acta, and said that so it was ruled in a Case before: And Jones said, it was nothing to the Vicar, for the Vicaridge may be endowed without the consent of the King, and 'tis not Mortmain. Palmers Reports 427. Erasmus Copes Case against Bedford.

Note, Leon. 3. part 210.

If the Parties admit a thing per nient dedire, the Jury is not bound by it; but where upon the pleading a special matter is confessed, the Jury shall be bound by it.

Impropriation.

*Hors de son fee.*

Where hors de son fee is pleaded, a release of the Seigniorie, is good Evidence. 8 E. 2. 262.

Debt for Rent.

In Debt for Rent upon a Lease for years, The Issue being joyned, if the Rent was paid or not, the Defendant gave in Evidence for part of the Rent, That the Plaintiff was by Covenant to repair the House, and did it not, and thereupon he expended the Rent in repairing the House, and the Question was, if this Evidence will maintain the Issue. Gaudy conceived it did, for the Law giveth this liberty to the Lessee to expend the Rent in reparations, and recoup the Rent, V. 12 H. 8. 1 Fitz. Tit. Bar. 242. 14 H. 4. 27. Fener, It is no Evidence, for if the Lessor will not repair it, the Lessee may have his Covenant against him. Clench, seemed he might well expend the Rent in reparations, but he ought to have pleaded it, and cannot give it in Evidence upon the general Issue, and thereupon they moved the Jury to find the special matter.

So that it seemed to the Justices, That the Defendant had liberty to expend the Rent in the reparations (they being to be done at the Plaintiffs Cost) but then that he ought to have pleaded this matter, as it was done in (almost) the like Case. Fitz. Tit. Bar. 242. Yet why might he not give it in Evidence upon the general Issue? for if the Law allows this to amount to a payment of the Rent, then the Defendant owes nothing, which maintains nil debet, and I think the other Book of 14 H. 4. 27, rejects this sort of special Plea, upon this reason, that the

Plea amounted to a general Issue: but there indeed the Kent was pleaded to be laid out at the Plaintiffs command, here only by authority in Law. I should be glad if any one would reconcile these two Books better. I know there is another reason in the Book (and assigned by Rolls in his Abridgment of the Case) why the Plea was rejected, viz. That the duty was acknowledged by the Plea, and therefore the matter of the Plea not good, without shewing a Deed of it; but I should have been better pleased with him, if he had assigned the other reason, viz. That it amounted to the general Issue. Which made Cheyne that he durst not joyn in Demurrer. For 'tis not pretended in either Case, that the Deed ordered the Kent to be laid out in the repairs.

And in that Case in F. where there was no express Order of the Plaintiff; it may be the Judges allowed the special matter to be pleaded, because the Jury should not be entrusted with the Law upon the general Issue, which may be said for the special pleading this matter in our Case, although it may amount to the general Issue.

But as to the residue, the Defendant shewed, he paid it to others, by the Plaintiffs Order; which was held clearly good, for what is paid by the Lessors appointment, is a payment to himself. Cro. Eliz. 223. Taylor against Beal. Vide Rolls Tit. Debt 605. 34 H. 6. 17. Bro. Debt 27.

Where a Man is Estopped in pleading to Estoppel. speak against his own Deed, yet he shall not in Evidence; as in Ilehams Case against

Reparations.  
Vide the Cases  
of Recouper.  
Lib. 5. 30.

Morris. Cro. 4 Car. 109. Upon Evidence at Bar, It was held by all the Justices of the Common-Pleas, That where one makes a Lease for years of Land by Indenture, and hath nothing in the Land, and afterwards purchaseth the Land and aliens it; although it be a good Lease for Years by Estoppel against him and his Alienee, by way of pleading, and shall bind them, yet it shall not bind the Jury, but they may find the truth, and if they find the truth, the Court shall adjudge it to be a void Lease. Vide tamen Rawlin's Case, Lib. 4. 53. Sutton and Dicken's Case, Leon. 1 Part, f. 206. 1 Inst. 47. 227. Edwards against Ornellhalum. Marsh. 64. James and Landon's Case, Cro. 27. Eliz. f. 36. Leon. 3 part, 210. Bull. 2 part, 41.

Demurrer.

Note, That if a Demurrer be made upon the Evidence, the Evidence ought to be entered verbatim. Kelway 77. Where in Account, against one generally as Bayliff, the Evidence that charged him specially by reason of his Tenure to collect, &c. was upon Demurrer held not good.

Surplusage.

Matter of Surplusage shewed in Evidence shall not hurt. Keilway 166.

Will.

Issue was upon a devise to A. Harding and her Heirs, modo & forma, and the Will given in Evidence was, A. H. shall have all my Inheritance, if the Law will allow it, and held sufficient to maintain the Issue, Hob. 2. So upon Ne unques receiver per maines J. S. a delivery from J. D. by the appointment of J. S. to the Plaintiffs use, is good Evidence. Hob. 36.

Account.

Issue

Issue whether A. was taken by a Capias Arrest.  
ad sat. at the Suit of B. and Evidence of a  
taking at the suit of C. and then a delivery  
of a Capias ad sat. at the Suit of B. to the  
Sheriff, is good. Hob. 55. But a taking  
upon a Capias utlagat. or Capias pro fine, with  
a prayer of the Plaintiff, that he may re-  
main for his satisfaction, is not. Ibid.

In a Consimili casu, where the demandant *Consimili casu.*  
counts of an alienation in Fee, yet the De- *Substance.*  
fendant shall make his Traverse to the alie-  
nation, modo & forma, and then the deman-  
dant shall maintain the Issue, by an Alie-  
nation in Fee, or in Tayl, or for Life, for  
they are all alike material. Hob. 105.

In an Assise the Defendant pleaded the Warranty.  
Dæd of the Brother of the Plaintiff, with  
Warranty, a Dæd of the Father with War-  
ranty, will not maintain the Defendants Is-  
sue. Hob. 55.

In Bennet's Case, Stiles 223. In a Tryal Juror.  
at Bar, It was said by the Court, That  
if either of the Parties to a Tryal desire  
that a Juror may give Evidence of some  
things of his own knowledge to the rest of  
the Jurors, that the Court will examine  
him openly in Court upon his Oath, and he  
ought not to be examined in private by his  
Companions. And it was also said, That  
if a Robbery be done in Crepusculo, the Hun- *Robbery.*  
dred shall not be charged; but if it be done  
by clear day-light, whether it be before Sun  
rise, or after Sun set, it is all one, and the  
Hundred shall be charged.

In

Demurrer upon Evidence.

In an Action on the Case, for digging a Hole in the High-way, into which his Gelding fell, &c. Upon Not Guilty, this Evidence was given, That the Plaintiffs Servant was driving the Plaintiffs Gelding in the way, and that by reason of the hole he fell, &c. Upon which it was demurred, because it was not proved that there was such a High-way, nor who digged the hole. Roll Chief Justice, This Evidence is no more than a special Verdict, and it ought to find the way and the Hole digged, and all the matter conducing to the Issue, and therefore it is not good as it is, and a Venire de novo was awarded. Stiles 335.

Action sur Case.

Demurrer upon Evidence.

In Trover and Conversion, there was a Demurrer joyned upon the Evidence, and thereupon the Court directed the Jury to find Damages for the Plaintiff, if upon the argument of the Demurrer, the Law should be adjudged for him, and then the Parties desired the Jury might be discharged, and referred the matter to the Judges, to determine the Law upon the Evidence. In this Case Roll Justice took this difference: If a Record be pleaded, it must be sub pede sigilli, or else the Judges cannot judge of it, but it may be given in Evidence, and the Jury may find it, though it be not sub pede sigilli. And the Court advised the Parties for their own expedition to let a venire facias de novo be issued out, and to waive the Demurrer upon the Evidence, because it was not good, nor could not bring the matter in question before them, that they might determine it; for one Party saith there is a Writ, and the other saith

Record.

saith there is not a Writ, which is bare matter of Fact for the Jury to determine, and not for the Court, and the Demurrer ought to have been, whether the Writ be good or bad, and should have admitted that there was a Writ tiel quel; and then had the whole matter come legally before the Court, to wit, whether the Evidence given to the Jury be sufficient for them to find a Verdict for the Plaintiff, upon the Issue joyned or not. For the matter of fact ought to be agreed in a Demurrer to an Evidence, otherwise the Court cannot proceed upon the Demurrer. And he said, if a Deed be pleaded, the Party must shew it in Court; but in Evidence, 'tis not absolutely necessary to shew it, if it can otherwise be proved to the Jury, and so it is of a Record: and concluded, that the Demurrer was not good, and that there ought to be a Venire facias de novo to try the matter again. Bacon Justice said, there ought not to be a Venire facias de novo, but that Judgment ought to be given against one Party, to wit, the Defendant, for ill joyning in the Demurrer, to the intent the Party that is not in fault may be dismissed; and the Parties here have waved the Tryal per pais, by joyning in the Demurrer. But Roll answered, That no Judgment at all could be given, for both parties be in fault, one by tendering the Demurrer, and the other by joyning in it, and the Defendant might have chosen whether he would have joyned or not, but might have prayed the Judgment of the Court, whether he ought to joyn. The Court advised to search Precedents, for a Venire facias

Deed.

Record.

cias de novo after a Demurrer upon an Evidence, and if there be any, they hold that the same Jury ought to come again, and not another. Roll said, if a special Verdict be found insufficient, a new Venire facias ought to Issue, and he saw no difference between that and this Case. Wright and Pindar's Case, Stiles 22. and 34.

Debr.  
Servants  
Wages.

In Debt for Servants Wages, viz. 20s. or a Kope yearly: the Defendant may plead payment of the Kope, and shall not be put to the general Issue, where the payment is of another thing than Money; but of Money he must plead nil debet, and give the payment in Evidence. And the Defendant may plead that the Plaintiff departed out of his Service, and shall not be forced to the general Issue, 9 E. 4. 36. Though surely that may be given in Evidence upon Nil debet, for the Plaintiff must prove he served: so indebitatus Assumpsit & non Assumpsit, upon the promise in Law, an Extinguishment by taking a Bond (being a matter of a higher nature) for the Debt may be given in Evidence.

Extinguish-  
ment.

And Note, if an Infant buy Goods, and afterwards give a Bond, and this Bond be avoided by Infancy, yet it seems the Contract shall not be revived. Sed dubitatur, Rolls Tit. Extinguishment 664. For now, this Bond which was voidable, is become void, and a void thing shall not have such effect: But a personal Action once suspended is gone for ever; but acceptance of a Bond shall not extinguish Rent, nor arrearages of an Account, before an Auditor of Record, because these are of a higher nature than the

Bond

Bond, the Rent being real, and the other of Record. But the Bond extinguishes the Contract for the Arrearages upon an Infimus computasset, &c.

Acceptance of Rent due the last day, and an Acquittance thereof, discharges all the arrearages due before. Lib. 3. 65. Unity of possession, in as high an Estate destroys the prescription, &c.

Acceptance.  
Rent.

A seizure and condemnation in the Exchequer of forfeited Goods, may be given in Evidence upon Not Guilty in Trover, but it must be pleaded in Trespass. In Trover of a Horse, that he is a Common Hostler, and that the Horse was put to him at Liverpool and dyed, is good upon Not Guilty. Roll 1 part, 22.

Trover.  
Trespass.  
*Vide Rolls* 1 part, 1, 2. A custom pleaded in Trover to take Corn to repair a Bridge, and *Cro. Eliz.* 433, and 252.  
Promise

Upon Assumpsit, the Plaintiff declares upon two considerations, and a simple promise: If the Jury find but one, or a conditional promise, this doth not maintain the Issue for the Plaintiff. Leon. 173. Musted and Hopper's Case.

Where the Issue is not perfect, no Evidence can be applied, neither can the Juries of Nisi prius proceed to the Tryal of such an Issue. As whether the Pony was paid after the date of the Obligation, and the date was left out and did not appear in the Record. Brown 2. 47.

Imperfect  
Issue.

In Debt upon a Bond, conditioned to pay 20 s. at the House of the Defendant, the 7th day of May, upon payment at the time and place. The Jury found the payment before the seventh day, and prayed the advice of the Court, if this was a payment

Payment.

at

at the day. The Court adjudged that the payment and acceptance before the day, was as well as if it had been paid at the day. Savile's Reports 96. Bond against Richardson. And so says Cook 1 Institutes 212. The time and place are but circumstances, and if the Obligee or Feoffee receive the Money at another place, or before the day, it is sufficient; or a lesser sum before the day. But More 47. Upon Issue of payment at the day and place, and Evidence of payment a Month before, and Demurrer upon the Evidence. Dyer, Brown and Welsh, said this Evidence doth not maintain the Issue, because before the day of payment there is no duty, and the day and place are parcel of the Issue, and the Act on one day is not an Act done on another day. As if an Executor pleads payment at the day, 'tis not good Evidence to shew that it was paid before the day by the Testator, for this doth not prove the Issue, and yet there was not any duty remaining at the day, and therefore the Pleading ought to have been specially according to the truth. Vide devant 198. And 'tis not like the Case, where the circumstances of time and place are put only for necessity of Trial; but in regard that payment is the substance, why is it not sufficient to prove, as well as to find, the effect and substance of the Issue? And 'tis not like the Case of collateral Conditions, where the condition is not to pay Money, but to do some collateral thing, as to deliver a Horse, a Robe or Ring, &c. or to pay Money to a Stranger, such collateral Conditions are more strictly to be observ'd. Vid. Inst. 212.

Porte,

Note, If there be a Demurrer, yet there may be a Plea, puis darrein continuance; and if the Plaintiff take Issue, or demur to this Plea, yet the Court must also consider of the first Demurrer; for if upon that standing confessed by the Demurrer, the Plaintiff could not have his Action, the Court cannot give Judgment for him, howsoever the latter Issue or Demurrer pass. But otherwise if the first had been an Issue, for then nothing were confessed to his prejudice, and then that had been utterly relinquished by a second Issue, or Demurrer, Hob. 81. *Such a Query, &c.* When this Plea is pleaded, the Justices of Nisi prius cannot proceed to take the Inquest, neither can the Plaintiff reply there, but in Bank, Bullstr.

*Plea puis darrein continuance.*

92. 93. Per Dodridge, In Trover and Conversion of Goods, if the Defendant derive a Title from a Stranger, this amounts to the general Issue, otherwise if from the Plaintiff, Latch 186. And baylment of the Goods to deliver to another, and delivery accordingly amounts to the general Issue, and may be given in Evidence upon it, Bullstr. 3

*Trover.*

part. 209. In Trespass against two, for entering in to the Plaintiffs Land, if one pleads his Freehold, and the other that he entered by the commandment of him that pleads it is his Freehold, here is to be but one Issue joined, viz. by him that claims the Interest, for upon that Issue all depends: If it be found against him, his Servant has no colour.

*Trespass.  
Freehold.*

And

## Averments.

And in regard what may be averred, may be proved and given in Evidence, 'twill not be impertinent to draw a short Scheme of Averments, with which I will conclude.

Averment  
had upon or  
against a  
Deed.

To alter, qualifie, or abridge the operation of it, if there be any apt words in the Deed, whereupon to ground it. As a Grant to A. the Son of B. and he hath two Sons of that name, of the Manor of S. and he hath two Manors of that name, which Son or Manor was intended may be averred. And so may a consideration of a Deed that is besides, but not that is against the expresse consideration of the Deed, nor can any thing against the words of the Deed, either enlarge or restrain it.

Consideration.

Uses.

Nor can a Use against or besides the expresse Uses in the Deed; but where no Use is expresse, or incertainly expresse, it may; and also to reconcile a Fine, and the Indentures to lead the Uses of the Fine. Lib. 2. 75.

But when a Deed is utterly incertain, no averment shall help it. As a Grant to one of the Sons of J. S. to two & heredibus, &c.

Upon or against a Record.

An Estate to a Woman for her Life, may be averred to be made for her Joynture. Dyer 146. Lib. 4. 4. And that the thing granted to me by a new Name is all one thing with that which hath another, or an old Name. Dyer 37. 44.

A thing that is against or besides a Record, or any thing that is within it, shall not be averred; therefore the date of a Recognizance expresse to be taken at Dale cannot be averred to be taken at Sale. But such an averment as may stand with the Record may be admitted. As that the Fine was before

foze the Inrollment (being both in one Term,) the Uses of a Fine oz common Recovery may be averred; oz what, oz who was meant, where there are two of a name, &c. Lib. 8. 155. The Heir in Tayl cannot aver against a Fine levied by his Ancestors, That Partes finis nihil habuerunt, Lib. 3. 84, 85. Leon. 75, 76, &c. But when Tenant in Tayl accepts of a Fine, and grants and renders the Land by the same Fine, which is executory, there, if no Execution be sued in the Life of Tenant in Tayl, his Issue may aver continuance of Possession, &c. in his Father, for this stands with the Fine, and the acceptance of the Fine alters not the Estate.

If a Man and his Wife sell her Land for Money, and after levy a Fine to the Wendee and his Heirs, it may be averred it was for Money, and so carry the Use to the Wendee, without any Declaration of Use, which otherwise would result to the Woman and her Heirs: and so other Uses may be proved, than what are in an Indenture of Uses subsequent to the Conveyance, &c. Lib. 9. 8. 5. 26.

Tenant in Tayl, with remainder in Tayl to A. Reversion in Fee to himself, bargains and sells Land, &c. and levies a Fine to him with Proclamation, with general Warranty. The Conusée infeoffs A.

Resolved the Bargainee had an Estate determinable upon the death of the Tenant in Tayl (and also the Reversion in Fee, which the Bargainor had,) and his Wife shall be endowed, but this determines upon the death of the Tenant in Tail.

D D

Res

A Fine taken by R. M. Esq; and returned by R. M. Militem, upon the Ded. p. the Record not to be averred against in Error. *Ylverton* 33 Cro. 2 part 11.

Resolved, The Fine doth not discontinue the remainder, for this doth not pass any Estate, but this Estate of the Bargain is durable, &c. so that it shall not determine, until the Tenant in Tail dye without Issue; and the conclusion may be confessed and avoided.

Resolved, The Warranty doth not bar the remainder, for this was annexed to the Fee determinable, &c. and to the Reversion in fee, and doth not extend to the remainder, for this was not displaced, and the Feoffee of the Conusee cannot enlarge, &c. 'Tis a Maxim, that a Warranty bars no Freehold, which is in esse, possession or remainder, &c. and not displaced before or at the time of the Warranty, although it be divested before the descent.

Resolved, A Warranty cannot enlarge the Estate.

Resolved, The Feoffment of the Conusee was not a discontinuance of the remainder, because he was not Tenant in Tail; so of the Grantee of totum statum suum, &c.

Resolved, A Collateral Warranty may be given in Evidence, and found by the Jury.

The Chief Justice held that by the Feoffment of the Conusee, the remainder was not displaced nor put to a right, for his Fee-simple, and his Fee determinate pass, and the Feoffment which in it self is not tortious, cannot be tortious to another. Wherefore it is when Tenant for Life, or remainder in Tail, &c. makes a Feoffment, for the Feoffment it self is tortious.

Note,

Note, There are some Titles, to which a Warrantie doth not extend, as in the Case of an Exchange, condition upon a Mortmain, consent to a Ravisher, &c. for in these Cases no Action lies, in which Voucher or Rebutter may be, neither shall a descent take away Entry in these Cases, and cannot be displaced out of their original essence. Collateral Warrantie shall bar Dower, and yet an Action is given for this. But a Fine, &c. and five years bar these Titles and Dower also, if an Action be not brought in time, Seymour's Case. Lib. 10. 96.

Buckler and Harvey's Case, Lib. 2. 55.

Tenant for Life Leases for four years, and afterwards grants the Tenements Hab. from P. for Life, after P. the Lessee attorns, then the Grantee enters and Leases at will, to which Tenant at will the Tenant for Life levies a Fine Come ceo, &c. Rem. in Fee enters.

Resolved, The Grant was void, for an Estate of Freehold cannot commence in futuro, and the Grant being void at the Commencement, the Attornment afterwards cannot make it pals; and that the Grantee was a disseisor. But if the Grant had been good at the Commencement, and was only to have its perfection by a subsequent act; as by Levy upon a Charter of Feoffment, &c. and the Grantee enter before the perfection, he is not a Disseisor, but a Tenant at Will.

Resolved also, If the Fine had been Levied to the Disseisor himself Come ceo, &c. he which had the right of remainder, may enter for the forfeiture, for it was agreed,

that the right of a particular Estate may be forfeited, and entry given to him who had but a right. As if Lessee for years be ousted, or Tenant for Life disseised, and the Lessee for years brings an Assise, or the Lessee for Life a Writ of right, &c. 'tis a forfeiture.

Resolved also, That the fine being levied to the Tenant at will, it is a forfeiture, and he which had the right of remainder may enter, and the Tenants for Life and at will also, shall be estopped to say quod partes finis nihil hab. &c. and of such estoppels which are by matter of Record, and trench to the disherison of them in Reversion, &c. they shall take advantage although they are strangers to the Record, for they are privies in Estate.

Resolved also, If the Disseisee levy a Fine to an Estranger, the Disseisor shall retain for ever; for the Disseisee against his own Fine cannot claim the Land, and the Conusee cannot enter, for the right of the Conusor cannot be transferred to him; but by the Fine the right is extinct, whereof the Disseisor shall have advantage. But in Crok. 1. part 482. 13 Car. it was moved, if the Disseisee, not knowing of the Disseisin, levied a Fine to a Stranger, whether that should bar his right, and move to the benefit of the disseisor, according to Buckler's Case; and said, if admitted, would be of very mischievous consequence, and by two Judges held, that it should not enure to the benefit of the Disseisor but to the use of the Conusor himself, for otherwise a Disseisin being

secret,

secret, may be the cause of disherison of any one who intends to levy a Fine for his own benefit, for assurance of his Lands upon his Wife and Childzen, or otherwise. 1 Inst. 277.

Not against such Certificates as are a definitive Tryal of the thing certified, as the Bishops Certificate of Excommunication, Bastardy, lawful Marriage, &c. So Certificates of the Marshal of the Host, which is a Tryal; but against Certificates only of information it may be: as against Certificates upon Commission out of any Court, or of the Commissioners that affirm a Man a Bankrupt, which are not tryable in a course of Law, but Informations. Lib. 7. 14. Lib. 8. 121.

Against a Certificate.

So of a return, if it is a definitive Tryal of the thing returned, no averment lyeth against it. As the return of a Sheriff upon some Writs, as a Writ of Partition, Elegit and of Hab. Corp. from a Mayor, &c. But if the return is not definitive, as upon a Rescouse, &c. an averment doth lye, and upon this you may go to Tryal: So if it be a return to indanger a mans Life, or his Inheritance, an averment may be had against it. Dyer 348. 117. So it lyeth against the returns of Bayliffs of Franchises, so that the Lords be not prejudiced in their Franchises thereby. Goldsb. 139, 129. pl. 23.

Upon a Return.

In Action for a false return, an averment doth lye against the Sheriffs return, Winch 100. and so it doth in any other Action, than in that the return was made.

Upon or against a Will or Administration, it lyeth although they be under Seal of Court.

Any averment may be upon a Will or any part of it that may help to expound it, and of such a thing that may stand with the Will,

and may be collected out of the words. As which Son he meant, &c. Lib. 8. 31, 41. But no averment against or besides that which is expressed in the Will, or which cannot be gathered to be the mind from the words, nor of any thing that doth not cohere with the Will: especially if it be about Lands, as in the Lord Cheyney's Case, Lib. 5. 68. A devise to A. and the Heirs of his Body, the remainder to B. and the Heirs Male of his Body, on condition that he or they or any of them should not alien, &c. no averment shall be taken to prove by Witnesses or other Evidence, that the Devisor intended to include A. within this condition by the words he or they; for the construction of Wills ought to be collected out of the words of the Will in writing, and not by any averment or proof out of it.

Against Court  
Rolls, or up-  
on them.

It lyes against the Rolls or Records of County Courts, Hundred Courts, Courts Baron. As that there is no such Record, or it is not as it is certified. 34 H. 6. 42. 9 E. 4. 4

Against com-  
mon presump-  
tion or rea-  
son.

No averment or proof is to be admitted against common presumption, as that they was more Rent behind when the acquittance of the last Rent was made. 1 Inst. 373. Nor against common Reason, as that Land doth belong to Land, or to a Messuage. Plow. 170. Lib. 4. 37.

Upon an  
award.

If the matter contained in an award, and the matter in the submission do not agree, it will hardly be supplied by an averment. Dyer 242. 52.

Date.

If the Defeasance of a Recognizance be dated before the Recognizance, it may be  
averted

aberrated to be delibered at or befoze the time of the Recognizance entred into. Perkin's Case 147.

Things apparent or necessarily intendable by Law, need not be aberrated, manifesta non probatione indigent; Quod constat clare, non debet verificari. Lib. 11. 25. Plo. 8.

Chief Justice Anderson held, Godbolt. 131. Devise. that if one devise Lands to the Heirs of J. S. and the Clerk writes it to J. S. and his Heirs, that the same may be holpen by averment, because the intent of the Devisor is written, and more, and it shall be naught for that which was against his Will, and good for the residue. But if a Devise be to J. S. and his Heirs, and it is written but to the Heirs of J. S. there an averment shall not make it good to J. S. because it is not in writing, which the Law requires; and so an averment to take away any surplusage is good, but not to increase that which is defective in the Will of the Testator. But with submission, if the Law should admit of such averments, it would be as mischievous one way as the other, and no Man could know by the words of the Will, what construction to make, nor what advice to give, but this shall be controlled by collateral averments out of the Will, and instead of proving the Testator's Will, it would be the destroying of it.

If the partition be by Writ, although it be unequal, yet it shall not be avoided by averment, but shall bind the Feme Coverts. And such averment against the return of the Sheriff shall not be good. 1 Inst. 171. Partition.

Consideration.

A valuable Consideration in a Bargain and Sale not expessed, may be averred, 2 Inst. 672.

A consideration which consists with the Dæd, and not repugnant, may be averred, as in a Bargain and Sale, if a particular consideration be expessed, and the general Clause, of other good Causes and Considerations, or without that general Clause, yet other considerations may be shewed: So if the particular Consideration be Love and Affection, yet payment of Money may be shewed: So a precedent intent of Uses and to levy a Fine may be shewed to guide the Use of the Fine, Rolls Tit. Uses. 790.

Uses.

As if I Covenant by Dæd to purchase Land, and then to levy a Fine, or make a Feoffment thereof to the use of another, and afterwards purchase and levy a Fine, or make a Feoffment, this use shall rise; for the Dæd is an Evidence of the precedent intent, and the uses of a Fine or Feoffment may be directed by the precedent intent, and yet such intent, is countermandable. But a Covenant to purchase and stand seised of Lands to uses, shall not raise the use after the purchase, because the use is to rise by the Deed, and at the time when the Deed was made, there was no Estate in the Land. Ibid.

So if one joynt-tenant covenant to stand seised of his Companions part, if he survive, yet no use shall rise, if he did survive, because at the time of the Covenant he could not grant nor charge the Land. Ibid.

Fine sur grant  
& render.

It is true that a fine sur grant and render, unless it be in special Cases, cannot be averred

red

red by Parol to be to any other use or intent than what is expressed in the Fine, Feoffment, or other Conveyance: But there is a diversity betwixt a Use and Consideration; for when a Fine, Feoffment, or other Conveyance import an express Consideration, a Man may aver, by word, another consideration, which may stand with the Consideration expressed; but the Parties cannot by Parol aver any other Use than is contained in the same Conveyance. Also no averment shall be against the Consideration expressed: But yet in some Cases a Fine Sur Grant & Render, may be ruled and directed in part by averment per parol; and this is when the Original Bargain and Contract betwixt the Parties, is by Indenture or other Deed; as where it is agreed by Indenture, that a Fine shall be levied of certain Lands, by the name of a certain number of Acres, to divers persons, and that they shall grant and render the Land again in Fee-simple, which shall be to certain Uses, the Fine is levied of the Land; but there is some variance betwixt the number of Acres comprised in the Fine; or the Fine is levied to one of the Parties only, who grants and renders the Land, so that there is a variance betwixt the Covenant and the Fine, either in the number, time or person, &c. Yet this Fine shall be averred to be to the Uses in the Indentures. For the intent of the Parties, and the substance and effect of their Original Bargain and Agreement, is chiefly to be regarded in all Conveyances, and therefore the Law allows an averment by Parol, to reconcile the Fine and

In

Indentures, although this sort of Fine imports a Consideration in it self, and regularly by a naked averment by parol, cannot be averred to be to any other use or intent than is comprised in the Fine it self, but by Deed it may be. Lib. 2. 77.

And although a Fine be of so high a nature, that it will not permit naked averments against the purport and consulance of the Fine; yet when the Law requires one of necessity, and for conformity to joyn with another in a Fine, the Law permits to shew the verity of the matter, to avoid prejudice and confusion. As where Baron and Feme an Infant levy a Fine, which is reversed for the Ponage of the Wife, the Baron and Feme shall have restitution presently, and the Conusee shall not detain this during the Coverture; for all the Estate passes from the Feme, and the Baron joyns for necessity and conformity, and therefore the Law permits that the verity of this shall be shewed, and that the whole Estate shall be restored to the Wife during the Life of the Husband. Workely and his Wife against Charnock. 30 and 31 Eliz. Lib. 2. 77.

What may be averred contra & præter Records, Fines, Recoveries Deeds, Wills, &c. is very requisite for a good Evidencer to be ready in, and therefore I have here given this taste, referring him to the Books at large, where he may see what averments he in remainder, the Heir in Tayl, the Wife, her Heirs, Estrangers, Privies, Parties, &c. may have to Fines, Recoveries, &c. Lib. 1. 76. Lib. 2. 77. Lib. 4. 71. Lib. 9. 140, 141. Lib.

Lib. 2. 55. Lib. 2. 88. Lib. 10. 50, 96. Lib. 3. 51, 88. Lib. 4. 72, 74, &c.

In Assault and Battery, if the Plaintiff **Assault.** prove only the Assault, he shall recover, for an Action of Trespass lyes for an Assault, of an Assault and Battery, Assault and menace, **Battery.** &c. See Rolls Tit. Trespass, 545. F. N. B. 91. a. &c.

To lay hands gently upon the shoulders of a Man and say that is He against whom the Justices Warrant is : or to serbe him with a Subpoena, proves no Battery.

These things following are good justifications, but cannot be given in Evidence upon the general Issue.

Correction by the Parents, Master, Schoolmistress, Apprehension of a common Cheater at Dice. Molliter manus imposuit, upon one setting a Dog upon him. Beating one by the Husband in defence of his Wife. By the Master in defence of his Servant ; or by the Servant in defence of his Master. Holding a Man that cometh to stop the River to his Mill ; or to throw down his Booth. Inevitably discharging his Musket in the Plaintiffs Face at a Muster. Beating one in defence of his possession of his Goods, House, Lands, Goods distrayned, &c. By a Forester, of one who resisted in the Forest. That he imprisoned another to prevent mischief. As the killing of another with whom he was fighting, (not wrangling with words) until the fury be over.

An erroneous Process to an Officer out of a Court, having Jurisdiction, in aid of the Waylifts. That the Executor entered the Plain-

Lunacy will not excuse in Battery, although it will of Felony.

Note a Man may justifie an Assault and Battery, but not wounding or maiming of life or member, or may-helm in defence of the Possession of his Lands or Goods. 2. Inst. 316.

Tenant in common cannot justify to enter into his Companions Ground to take the Horse they have in Common, although he may take him elsewhere.

Plaintiffs Ground to take the Testators Timber there. That he had a Piscary, and put Stakes in the soil, Taking his Goods stolen, in the Plaintiffs House, upon fresh pursuit. Entering his Soil to throw down a Rusance. Or to take my Cattel, which the Plaintiff put in his Ground. To throw down the Plaintiffs House on Fire, next mine. Breaking his Windows or House, to get out, where he imprisoned me. To take a handful of Grain out of his heap, who took one out of mine, and threw it into his. To carry away his Grain or Pony which he threw into my heap. To chase his Cattel with a Dog out of my Ground, Damage feasant. To throw that into the Plaintiffs Ground which he threw into mine. That my Cattel took a mouthful, &c. of his Grass, passing in the way I had over his ground, against my will. Throwing Goods into the Thames, out of a Barge to save the Lives of the Passengers. To fetch out of the Plaintiffs Ground, the Trees he granted me. To dig his Ground to mend my Pipe there. That I hunted Cattel out of my Ground with a Dog which against my will run into his Ground, I rating and recalling him. A Prescription to cut Grass in the Plaintiffs Ground, lying nigh the Church, to estrow the Church, being but an easement.

Distress by a Stranger as Bayliff, and the assent of the Party. By the command of the Chief Justice, Order of Chancery, &c. Rolls Tit. Trespas. 559. That the Plaintiff ought to Impale against a Forest, and for default of Pales, the Beasts went in, and the Forester fetched them out. These

These are justifications and excuses that must be pleaded, and cannot be given in Evidence upon Not Guilty, unless it be in mitigation of Damages.

Trespass lies for Goods stolen, although the Thief be Convicted of Felony. Latch 144. Trespass.]  
Markhams Case, and so I knew my Lord Hales held, although in Rolls Tit. Trespass 557. 'tis said, if it appears on the Evidence that it was Felony, Trespass lies not. Which I think is Felony, not Law.

A man who sows the Lands to halves with the Owner, or three agree to sow the Land, where two of them have no Interest, and a Stranger take the Corn, they cannot join in Trespass, having no interest but an Agreement, but the Owner only must bring the Trespass. Cro. 3 part, 143. Goldsb. 77. Sows to halves.

Upon reversing an Outlawry, the Party is restored, and may have Trespass; but upon reversal of a Judgment the Party shall only be restored to the Bond for which the Sheriff sold his Term, upon a Fieri fac. Cro. 3 part, 270. Outlawry reversed. Tenancy in Common.

Upon Not Guilty in Trespass, Quare clausum fregit, at the Tryal the Defendant shall not say, that the Plaintiff is Tenant in Common; he should have pleaded this, and hath now lost this advantage; and if the Jury find it, their finding is not material. Cro. 3 part, 554. Where Tenants in Common shall join in an action and where not, and what actions the one shall have against the other. See 1 Inst. 197, 200. &c. Woods.

A Man sells all his Woods standing, growing, &c. upon the Premises, to hold during the Life of the Vendor, rendering Rent; the Vendor cuts down all the Trees: if he cuts Wood afterwards growing in the same place, the Vendor may have Trespass. Leon. 3 part, 7.

If a Carrier lose Goods, a Special Action of the

Trover a-  
gainst a  
Carrier.  
Copy-  
holder.

Estray.

Continuan-  
do.

Parco  
fracto.

Park.  
Warren.

Commo-  
ner.  
False Im-  
prison-  
ment.

Possession.  
Entry.

the Case lies against him, but not Trover, Rolls  
Abr.6. so of a common Carrier by Boat. Noy. 114.

Trespals lyes for a Coppelholder against the  
Lord for cutting down Trees, that he the Te-  
nant ought to have for repairs. Godbolt 173.

By seisure of an Estray, the Lord hath but the  
Custody and not the Property, and therefore if he  
works the Horse, Trespals lyes. Yelverton 96. 97.

Trespals with a continuando, cannot be for ta-  
king a Horse, nor ten Trees &c. nor without a  
re-entry of the disseised, unless his re-entry be  
taken away by the Act of God, or the Estate be  
determined so as he cannot enter, as if Tenant  
pur auter vie be disseised, and cestuy que vie dye, for  
there his entry is taken away by the Act of God;  
otherwise if it be taken by his own act, as if he  
releale to the disseisor, &c. 19 H. 6. 28.

Upon non cul. No Park by Prescription or  
Grant is good Evidence. 18 H. 6. 22.

General Trespals for breaking his Park, and  
taking his Deer, &c. doth not ly at Common  
Law, but a Writ is given by the Statute West. 1.  
cap. 20. So if A. have a free Warren in the Soil  
of B. A. shall not have Trespals, but ease for en-  
tering the Warren and stopping the holes, &c.

A Commoner cannot have Trespals for the  
Gjals. After a Superseas shewed to the Bayliffe,  
false imprisonment lyes against them, not against  
the Sheriff, so against the Bayliff of a Fran-  
chise, if he take other Mens Goods in executi-  
on upon the Sheriffs Warrant, not against the  
Sheriff, nor against the Parry, unless he pro-  
cure the Bayliff to take the wrong.

He that hath the Freehold in Law, unless he  
hath actual possession cannot have Trespals.  
Therefore the Heir cannot have Trespals against the  
the

the abater, nor against Tenant at sufferance before hath entered, and only from that time: But an Executor or Administrator shall, by relation, have Trespasses from the death of the Intestate, &c. But a disseisor after entry shall have an action for all mean Trespasses from the disseisin, even against Strangers, for he is restored to the possession ab initio.

Trespasses cannot be maintained against him who comes by the Goods lawfully, as by the Plaintiffs delivery, or under that, or by act in Law, &c. but Detinue. But Trespass lies against Tenant at will, or him that I lend my Goods to, who destroys them; for thereby the privacy is determined. It lyes against a Miller for taking Toll where none is due; for taking my Servant out of my service; for rescuing one taken at my suit out of the Bayliffs hands, for the Bayliff is my Servant. For beating my Wife or Servant per quod, &c. Not against him that J.S. sells my Horse to, or has my Goods from the Sheriff, although the Sheriff took them wrongfully. It lies for hunting a Fox, &c. in my Ground. Against Church-wardens, who act by the Justices of the Peace's Warrant, if the Warrant be not good.

For digging so near my ground that it fell into the Defendants pit: But not that my House fell into the pit, for 'twas my fault to build so near another mans ground: For entering my ground, to take out his Falcon, which flew thither after Game. For killing my Tumbler in his Warren.

Although I sell the goods, it lyes for a Trespass done before. Tender of sufficient amends before the action brought, is a good Bar, for a negligent Trespass, not for a voluntary one.

If

Time.

Bar.

*Ab initio.*

If a man enter into a place by authority of Law, and abuse this authority, he is a Trespasser *ab initio*, for his first entry shall be intended for this purpose. As if the Lessor enter to view Waste, and stay all night. If the Kings Purveyor sells my goods. If the searcher abuses my Stuffs. If a man will stay in a Tavern all night. If he detains a distress after amends tendered before impounding. If a Bayliff refuse Bayliff Treasures doth not lye against him *ab initio*, but case; for the Sheriff or under-Sheriff, not he, ought to take Bail; not against the Party nor Bayliff, or person in aid, if the Sheriff doth not return his Writ of Latitat, or makes a false return; but it doth against the Sheriff: So of an Officer of an Inferior Court.

If the Lord work an Estray, Distress, &c. Or Executors find a Bond and cancel it, thinking it was discharged and it was not; they are Trespassers *ab initio*, although they came lawfully to the possession at first. Rolls Tit. Trespass 563.

*Lunatick.*

The Lunatick (and not the person to whom he is committed) must bring the action in his name for a Trespass done in the Land. Brownl. 1 part, 197.

Note, The Chapter of Verdicts gives much light to know what Evidence is good and what not.

The knowledge of Evidence is so beneficial, and necessary, for all practisers in the Law, that none can know too much, be too well versed, or too often conversant in it. Therefore to compleat this Treatise, especially in this particular, I have drained the Law-Books of all, or the most principal Cases relating to it; and have added some Observations very fit for the Unlearned to know, and I hope not fit for the Learned to reject.

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# T H E T A B L E

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in the BOOK.

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